249 N.C. App.—No. 4 Pages 603-684

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 24, 2019

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 4 OCTOBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appeal and Error—challenged testimony—waiver—On appeal from defendant's convictions resulting from the theft of a laptop computer and an iPad, the Court of Appeals held that defendant had waived review of his challenges to certain testimony by a police detective regarding what she observed in surveillance footage. Even assuming error, there was no prejudice because other evidence showed that defendant was present in the office building and was seen with the computer bag in his possession. **State v. Patterson, 659.**

Appeal and Error—failure to indicate appeal from judgment suspending sentence—petition for writ of certiorari granted—Where defendant's notice of appeal failed to indicate that he was appealing from the Judgment Suspending

Sentence entered against him as a result of his plea of no contest, as was required by N.C.G.S. § 15A-979(b)—instead only indicating that he was appealing from the order denying his motion to suppress—the Court of Appeals granted defendant's petition for writ of certiorari to review the appeal on the merits. **State v. Jackson, 642.**

Appeal and Error—guilty plea—no statutory right of appeal for sentence—petition for writ of certiorari granted—Where defendant entered into a guilty plea for several drug offenses, was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, and had no statutory right of appeal, the Court of Appeals granted defendant's petition for writ of certiorari to reach the merit of his appeal. **State v. Pless, 668.**

Appeal and Error—guilty plea—sentence governed by N.C.G.S. § 90-95—no statutory right of appeal—Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, the Court of Appeals granted the State's motion to dismiss defendant's appeal. Pursuant to N.C.G.S. § 15A-1444(a2), because defendant's sentence was governed by N.C.G.S. § 90-95 rather than § 15A-1340.17 or § 15A-1340.23, he had no statutory right of appeal. **State v. Pless**, **668.**

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Child Abuse, Dependency, and Neglect—adjudication—The trial court did not err by adjudicating the minor child abused and neglected where the child sustained unexplained, non-accidental injuries while in respondent parents' custody. The Department of Social Services was not required to rule out every remote possibility or prove abuse beyond a reasonable doubt. **In re L.Z.A., 628.**

Child Abuse, Dependency, and Neglect—findings of fact—sufficiency—The trial court's finding of fact 3 in a child abuse and neglect case, with the exception of finding of fact 3(i), was supported by clear and convincing competent evidence. To the extent that finding of fact 3(i) was not supported by clear and convincing competent evidence, there was no prejudicial error. **In re L.Z.A., 628.**

Child Abuse, Dependency, and Neglect—reunification plan—concurrent plan of adoption—The trial court did not abuse its discretion in a child abuse and neglect case by implementing a concurrent plan of adoption in addition to the reunification plan. Assuming arguendo it was error, there was no prejudice. **In re L.Z.A., 628.**

Child Abuse, Dependency, and Neglect—writ of certiorari—adjudication and disposition—appointed counsel—Respondent mother's petition for writ of certiorari was allowed in a neglected and dependent juveniles case for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders were vacated. The case was remanded for a new hearing on

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

BALDELLI v. BALDELLI

[249 N.C. App. 603 (2016)]

SUSAN J. BALDELLI; TRAVEL RESORTS OF AMERICA, INC.; AND TRIDENT DESIGNS, LLC, PLAINTIFFS
v.
STEVEN R. BALDELLI, INDIVIDUALLY AND AS PRESIDENT OF TRAVEL RESORTS OF AMERICA, INC.; TRAVEL RESORTS OF NORTH CAROLINA, LLC; DERBY INVESTMENT COMPANY, LLC; AND TRIDENT CAPITAL, LLC, DEFENDANTS

No. COA16-142

Filed 4 October 2016

Divorce—equitable distribution—prior pending action

Where Plaintiff (Susan Baldelli) and Defendant (Steven Baldelli) incorporated a number of businesses during their marriage and subsequently filed claims for equitable distribution of their marital property, the trial court erred by dismissing, for lack of subject matter jurisdiction, Plaintiffs' (Susan Baldelli, together with two businesses) claims. The prior pending action doctrine did not divest the superior court of jurisdiction over Plaintiffs' breach of fiduciary duty claim. Further, the breach of fiduciary duty claim should be held in abeyance by the superior court until the district court equitable distribution action is resolved, and all of Plaintiffs' superior court claims should be held in abeyance so that the record can be more fully developed through resolution of the district court action.

Appeal by Plaintiffs from orders entered 22 October 2015 and 9 December 2015 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 8 August 2016.

Poyner Spruill LLP, by Daniel G. Cahill and Caroline P. Mackie, for Plaintiffs-Appellants.

Robinson & Lawing, LLP, by C. Ray Grantham Jr. and L. Bruce Scott, for Defendant-Appellee Steven R. Baldelli.

The Bomar Law Firm, by J. Chad Bomar, for Defendants-Appellees Travel Resorts of North Carolina, LLC; Derby Investment Company, LLC; and Trident Capital, LLC.

McGEE, Chief Judge.

Susan J. Baldelli ("Plaintiff"), together with Travel Resorts of America, Inc. ("TRA") and Trident Designs, LLC ("Trident Designs") ("Plaintiffs")

and Steven R. Baldelli, ("Defendant"), individually and as president of TRA, together with Travel Resorts of North Carolina ("TNC"), Derby Investment Company, LLC ("Derby") and Trident Capital, LLC ("Trident Capital") ("Defendants") are parties to this action. Plaintiff and Defendant were married on 15 September 1979 and separated in 2013. Both Plaintiff and Defendant filed claims for equitable distribution of their marital property in District Court, Moore County. During the course of their marriage Plaintiff and Defendant incorporated a number of businesses, including those named above as parties to this action. Along with Plaintiff and Defendant, Trident Capital and TRA are parties to both the district court action and the present superior court action. Derby, TNC, and Trident Designs are not named parties in the district court equitable distribution action. Plaintiff and Defendant are in agreement that TRA and Trident Designs constitute marital property. Plaintiff contends that Trident Capital, TNC, and Derby are marital property. Defendant contests this contention.

Plaintiffs filed the complaint in this action on 23 February 2015, in Superior Court, Moore County, and filed an amended complaint on 4 May 2015, in which they set forth five claims: (1) breach of fiduciary duty against Defendant, relative to his actions as president of TRA; (2) demand for accounting, also related to Defendant's role as president of TRA; (3) breach of contract against TNC and Trident Capital; (4) breach of contract against Derby; and (5) an alternate claim against Derby for *quantum meruit*. Defendant moved to dismiss Plaintiffs' complaint on 8 June 2015, pursuant to the prior pending action doctrine, arguing that superior court did not have jurisdiction over the claims because of the ongoing district court action for equitable distribution which, according to Defendant, encompassed substantially similar claims and parties. Defendant further asked the trial court to dismiss the breach of fiduciary duty claim because it was required to be brought as a derivative action, and Plaintiffs had failed to do so; in the alternative, Defendant asked the superior court to hold the present action in abeyance until the district court matter was settled. The remaining Defendants also filed motions to dismiss, based in part on arguments that the prior pending action doctrine served to divest the superior court of jurisdiction. Plaintiffs filed a motion to file a second amended complaint on 14 July 2015, requesting that they be allowed to amend the complaint in order to "assert the breach of fiduciary duty claim directly by TRA against Defendant[.]"

Defendants' motions were heard on 16 September 2015 in superior court. Plaintiffs' action was dismissed by order entered 22 October 2015, because the superior court ruled that it "lack[ed] subject matter

jurisdiction over the matters asserted." The superior court, also by order entered 22 October 2015, further denied Plaintiffs' motion to file a second amended complaint as moot. Plaintiffs appeal.

Plaintiffs argue that the trial court erred by dismissing Plaintiffs' claims for lack of subject matter jurisdiction. We agree.

Specifically, Plaintiffs argue that the trial court "improperly concluded the prior pending domestic action precluded the [trial court] from considering Plaintiffs' claims." This Court has stated:

> The "prior pending action" doctrine involves "essentially the same questions as the outmoded plea of abatement," and is, obviously enough, intended to prevent the maintenance of a "subsequent action [that] is wholly unnecessary" and, for that reason, furthers "the interest of judicial economy." "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?"

Jessee v. Jessee, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011) (citations omitted).

In *Burgess v. Burgess*, 205 N.C. App. 325, 698 S.E.2d 666 (2010), the plaintiff filed an action in superior court alleging, *inter alia*, "breach of fiduciary duties, inspection, and accounting" related to a business, Burgess & Associates, that had been jointly owned by the plaintiff and her husband ("the defendant") during their marriage. *Id.* at 330-31, 698 S.E.2d at 670. At the time the superior court action was filed, the plaintiff and the defendant were already involved in an equitable distribution action involving Burgess & Associates. *Id.* at 326, 698 S.E.2d at 667. The defendant moved to dismiss the plaintiff's action based in part on his argument that the prior pending action doctrine served to divest the superior court of jurisdiction because the parties and subject matter of the two actions were substantially similar. *Id.* at 326, 698 S.E.2d at 668. This Court held that the superior court had not erred in ruling that it had jurisdiction to hear the claims of breach of fiduciary duties, inspection, and accounting. This Court reasoned:

> It is apparent that if plaintiff is successful in her equitable distribution action, she can only receive a portion of the issued shares of Burgess & Associates, along with any

> other marital or divisible property she may be awarded in the trial court's discretion. Should she prove that she is entitled to an unequal distribution, she may, at the most, receive a larger portion of marital or divisible property as an offset—property which she assisted in contributing to the marriage. She would not be entitled to any of [the defendant's] separate property.
>
> In stark comparison, if plaintiff is successful in prosecuting her derivative suit for breach of the duties of good faith and due care, she may obtain a judgment against [the defendant] in the right of the company in excess of $10,000 from a jury verdict. The judgment would be against [the defendant] in his individual capacity, and Burgess & Associates would be able to enforce the judgment against [the defendant's] separate property. Despite the breadth and variety of the factors in section 50–20, there is no similarity between the relief sought in plaintiff's equitable distribution action and the derivative suit. In particular, plaintiff sets out several factual allegations in the shareholder suit predating [the defendant's] and plaintiff's separation. Were we to follow defendants' suggestion to lump the derivative suit here into subsection (11a) of N.C.G.S. § 50–20(c), those allegations would not be available to plaintiff in the distribution of marital property. N.C.G.S. § 50–20(c)(11a) (only waste or neglect occurring "during the period *after separation* of the parties and *before the time of distribution*" considered in making an unequal distribution) (emphasis added). Even if pre-separation acts could be considered pursuant to N.C. Gen. Stat. § 50–20(c)(12) (allowing consideration of "[a]ny other factor which the court finds to be just and proper," the district court cannot, as we have already noted, reach [the defendant's] separate property in equitable distribution.

Burgess v. Burgess, 205 N.C. App. 325, 331–32, 698 S.E.2d 666, 671 (2010).

In *Ward v. Fogel*, the plaintiff and the defendant were already involved in an action for equitable distribution when the plaintiff filed a second action in superior court alleging, *inter alia*, "(1) fraudulent inducement; (2) constructive fraud; (3) and breach of fiduciary duty[.]" *Ward v. Fogel*, 237 N.C. App. 570, 573, 768 S.E.2d 292, 296 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 302 (2015).

Though this Court held that Florida courts had exclusive jurisdiction, it further reasoned:

> Even if the North Carolina district court did have jurisdiction over the parties, an equitable distribution proceeding would not be able to provide plaintiff the relief she requests. Plaintiff, like the wife in *Burgess*, has demanded a jury trial, to which she would be denied access in district court. Additionally, like the wife in *Burgess*, plaintiff is seeking compensatory damages in excess of $10,000.00, in addition to punitive damages, on her claims for breach of fiduciary duty, constructive fraud, and fraudulent inducement. If she is successful on these claims, she may get a judgment which could be enforced against Mr. Ward's separate property. However, in the equitable distribution claim, the most that plaintiff would be able to win is a favorable distribution of marital or divisible assets. Therefore, as in *Burgess*, the relief plaintiff seeks in superior court would be unavailable in district court, leading us to conclude that Wake County Superior Court has proper jurisdiction to adjudicate these matters.

Ward, 237 N.C. App. at 577–78, 768 S.E.2d at 299 (citation omitted).

In the case before us, Plaintiffs allege, *inter alia*, breach of fiduciary duty against Defendant for which Plaintiffs claim damages in excess of $25,000.00. If Plaintiffs prevail in this breach of fiduciary duty claim, they will collect from Defendant's separate property, which is a remedy not available to them in the district court equitable distribution action. Although it is possible that the equitable distribution action could resolve the issues underlying Plaintiffs' claim for breach of fiduciary duty, it is also possible that the equitable distribution action will leave these issues unresolved or, as stated above, leave Plaintiffs without the full remedy that would be provided in the superior court action. Further, as in *Burgess*, at least some of the acts that Plaintiff contends constituted a breach of Defendant's fiduciary duties occurred before the date of separation. These acts will generally not be relevant to equitable distribution decisions concerning how to divide marital property. *Burgess*, 205 N.C. App. at 332, 698 S.E.2d at 671. We therefore hold that the prior pending action doctrine did not serve to divest the superior court of jurisdiction over Plaintiffs' breach of fiduciary duty claim, and we reverse the order of the trial court and remand for further action as provided below.

However, because the parties and subject matter of Plaintiffs' breach of fiduciary duty claim are closely related – when not identical – to the parties and the subject matter to be decided in a portion of the district court action, and because there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions.

> We have addressed a similar situation of potential unresolvable conflict between two courts with jurisdiction in *Jessee v. Jessee*, 212 N.C. App. 426, 713 S.E.2d 28 (2011). In *Jessee*, the plaintiff-husband had commenced an action in Forsyth County alleging that the defendant-wife had fraudulently converted funds to her own use after the defendant had filed an action for equitable distribution in Alamance County. Because the claims brought in the Forsyth County action concerned acts which occurred after the date of separation and the equitable distribution action would only address what had occurred prior to separation, we concluded that the equitable distribution action did not deprive the superior court in Forsyth County of jurisdiction under the prior pending action doctrine. Nevertheless, because of the "clear interrelationship" between the two cases, we concluded that "the Forsyth County case should be held in abeyance pending resolution of the Alamance County domestic relations case."

Johns v. Welker, 228 N.C. App. 177, 182, 744 S.E.2d 486, 490–91 (2013) (citations omitted); *see also Jessee*, 212 N.C. App. at 439, 713 S.E.2d at 38 (citations omitted) ("[D]espite our belief that . . . the 'prior pending action' doctrine [does not] mandate dismissal of the [superior court] action, there is a clear interrelationship between the two cases, such that the equitable distribution portion of the [district court] domestic relations case should be resolved prior to the determination of the [superior court] case. For that reason, we further conclude that the [superior court] case should be held 'in abeyance pending resolution of the' [district court] domestic relations case, and the results of that equitable distribution case taken into consideration in the resolution of the [superior court] case.").

We hold that Plaintiffs' breach of fiduciary duty claim in this case should be held in abeyance by the superior court until the district court

equitable distribution action is resolved. Concerning Plaintiffs' additional superior court claims, they are similar in that though the underlying issues might be resolved in the equitable distribution action, we cannot say for certain that unresolved issues would not remain. Further, the record before us has not been developed to an extent as to provide this Court full confidence in making a determination on subject matter jurisdiction.

> The determination of subject matter jurisdiction is a question of law and this Court has the "power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." However, the record is devoid of evidence from which we may ascertain whether or not the trial court possessed subject matter jurisdiction[.] We vacate the order filed 22 October 2002 and remand this case for findings of fact based on competent evidence to support the trial court's conclusion of law regarding subject matter jurisdiction[.]

In re J.B., 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004) (citations omitted). Though the record before us is not "devoid" of evidence from which to determine whether dismissal based upon lack of subject matter was proper, we believe it is appropriate, based upon the facts before us, to hold all of Plaintiffs' superior court claims in abeyance so that the record can be more fully developed through resolution of the district court action. Following resolution of the equitable distribution action in district court, Plaintiffs can decide whether to proceed with any unresolved claims in the present superior court case. If Plaintiffs decide to advance any of their superior court claims, the superior court, based in part on the resolution of the equitable distribution action, will then decide which claims, if any, should be allowed to proceed.

We further vacate the superior court's 22 October 2015 order denying Plaintiffs' motion for leave to file a second amended complaint as moot. Plaintiffs may, if needed, file for the superior court's consideration a motion for leave to file a second amended complaint at the appropriate time following resolution of the district court action.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

IN RE DIPPEL

[249 N.C. App. 610 (2016)]

IN THE MATTER OF LYLE DIPPEL, RESPONDENT

No. COA16-54

Filed 20 September 2016

Clerks of Court—appeal from order—adjudication of competency

The trial court erred by dismissing petitioner son's appeal seeking an adjudication that respondent father was incompetent and the appointment of a guardian. N.C.G.S. § 35A-1115 allows appeals to superior court from any order of the clerk of court adjudicating the issue of incompetence.

Appeal by petitioner from order entered 22 September 2015 by Judge Phyllis M. Gorham in Columbus County Superior Court. Heard in the Court of Appeals 11 August 2016.

Christopher W. Livingston for petitioner-appellant.

No brief filed for respondent-appellee.

ZACHARY, Judge.

Kenneth Dippel (petitioner) appeals from the trial court's order dismissing his appeal from an order of the Clerk of Superior Court for Columbus County. The clerk ruled that respondent Lyle Dippel, petitioner's father, was not incompetent and dismissed the proceeding initiated by petitioner seeking an adjudication that respondent was incompetent and the appointment of a guardian for respondent. The trial court dismissed petitioner's appeal from the clerk's order on the grounds that under N.C. Gen. Stat. § 35A-1115 (2015) petitioner lacked standing to appeal and the trial court lacked jurisdiction to entertain the appeal. For the reasons that follow, we reverse.

I. Factual and Procedural Background

On 8 June 2015, petitioner filed a petition seeking an adjudication that respondent was incompetent and applying for appointment of a general guardian for respondent and of an interim guardian *ad litem*. Petitioner alleged that respondent was classified as totally disabled by the United States Department of Veterans Affairs due to complications of diabetes, and that respondent had granted a durable power of attorney to petitioner's brother, Michael Dippel, although respondent was

"unable to fully understand the full consequences of executing a power of attorney[.]"

On 18 June 2015, Attorney John Alan High was appointed as interim guardian *ad litem* (GAL) for respondent. On 16 July 2015, petitioner filed a motion for recusal of the Columbus County Clerk of Court and transfer of the case to Robeson County. Petitioner asserted that the Clerk had a "conflict of interest" due to his friendship with Michael Dippel's wife. The record does not include an order on petitioner's motion; however it is clear from Columbus County's continued exercise of jurisdiction over the case that the motion was denied.

On 12 August 2015, an assistant clerk of court entered an order on petitioner's petition, using Administrative Office of the Courts form No. AOC-SP-202 for this purpose. The order stated that "[a] hearing was held before the Clerk of Superior Court and, after hearing the evidence, the Court does not find by clear, cogent, and convincing evidence that the respondent is incompetent[,]" and that "[i]t is adjudged that Respondent is not incompetent and the proceeding is dismissed." On 17 August 2015, petitioner appealed the clerk's order to the Superior Court of Columbus County. On 22 September 2015, respondent and Michael Dippel filed motions to dismiss petitioner's appeal, asserting that petitioner lacked standing to appeal the clerk's order and the superior court lacked jurisdiction to entertain petitioner's appeal, because "there was no order adjudicating the Respondent to be incompetent."

On 7 October 2015, the trial court filed an order dismissing petitioner's appeal. The court stated that its order was "based upon N.C. Gen. Stat. § 35A-1115 and applicable caselaw," that the "Petitioner lacks standing to appeal the dismissal of the Petition for Adjudication of Incompetence by the Assistant Clerk of Superior Court," and that the trial court "lacks jurisdiction to hear any such appeal[.]" Petitioner noted a timely appeal to this Court from the trial court's dismissal of his appeal from the order of the assistant clerk of court adjudging that respondent was not incompetent and dismissing petitioner's petition.

II. Standard of Review

The trial court dismissed petitioner's appeal from the order entered by the assistant clerk of court based upon the court's interpretation of N.C. Gen. Stat. § 35A-1115, which governs the right of appeal from an order of the clerk of court on a petition seeking an adjudication that an individual is incompetent. Thus, "the issue before the appellate court is one of statutory construction, which is subject to *de novo* review."

Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc., 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (citing *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010)).

"The primary objective of statutory interpretation is to give effect to the intent of the legislature." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (citations omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, 'a statute is ambiguous, judicial construction must be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Burgess v. Your House of Raleigh*, 326 N.C.205, 209, 388 S.E.2d 134, 136-37 (1990)) (other citation omitted). The language of a statute is ambiguous when it is "fairly susceptible of two or more meanings." *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (citation omitted).

III. Discussion

The clerk of court has exclusive jurisdiction over the initial determination of whether an individual is incompetent. N.C. Gen. Stat. § 35A-1102 (2015) states that Chapter 35A of our General Statutes "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." Pursuant to N.C. Gen. Stat. § 35A-1103(a) (2015), "[t]he clerk in each county shall have original jurisdiction over proceedings under this Subchapter."

We next consider the right of appeal from the clerk of court. The general rule, expressed in several statutes, is that an aggrieved party may appeal from an order of the clerk of court to superior court. N.C. Gen. Stat. § 7A-251(a) (2015) states that:

> In all matters . . . which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

Chapter 1 of the General Statutes in turn provides in N.C. Gen. Stat. § 1-301.1(b) (2015) that "[a] party aggrieved by an order or judgment entered by the clerk may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a trial or hearing *de novo*[.] N.C. Gen. Stat. § 1-301.2 (2015) specifies that:

> (e) . . . [A] party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing *de novo*. . . .
>
> (g)(1) [Regarding] [p]roceedings for adjudication of incompetency[,] . . . Appeals from orders entered in these proceedings are governed by Chapter 35A to the extent that the provisions of that Chapter conflict with this section.

The above-quoted statutes establish that an aggrieved party may appeal to superior court from an order of the clerk of court in a competency proceeding, unless the right is countermanded by a different statute in N.C. Gen. Stat. § Chapter 35A. In this case, the specific statute addressing appeals from the clerk of court in competency proceedings is N.C. Gen. Stat. § 35A-1115, which states that "[a]ppeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals." We conclude that N.C. Gen. Stat. § 35A-1115 does not conflict with other statutes and that it permits appeal from the clerk's order in the instant case.

We discern no legal basis or policy consideration that suggests a legislative intent to deprive an aggrieved party from appealing a clerk's determination that a respondent is not incompetent. We note that in the present case, petitioner moved for recusal of the Clerk of Court on the grounds that the clerk had a conflict of interest. Petitioner's motion highlights the benefit of allowing review of the clerk's order, without regard to the merits of petitioner's motion. We conclude, given the ubiquity of the right of appeal from the clerk of court to superior court and the absence of any limiting or restrictive language in the statute, that the only reasonable interpretation of N.C. Gen. Stat. § 35A-1115 is that the statute allows appeal to superior court from any order of the clerk of court "adjudicating [the issue of] incompetence."

In reaching this conclusion, we have rejected an alternate interpretation, suggested in respondent's motion to dismiss petitioner's appeal, that would limit the right of appeal to orders "adjudicating [that an individual meets the definition of] incompetence." We observe that N.C. Gen. Stat. § 35A-1115 provides for appeal from orders adjudicating *incompetence*, a noun, rather than from orders adjudicating that a specific person is *incompetent*, an adjective. We conclude that respondent's proposed interpretation of N.C. Gen. Stat. § 35A-1115 is not reasonable.

Although the trial court's order also references petitioner's standing to appeal, there is no question that petitioner is an aggrieved party and thus entitled to appeal. We hold that N.C. Gen. Stat. § 35A-1115 allows an aggrieved party to appeal from an order of the clerk of court determining the issue of incompetence, whether the order adjudges (as in the present case) that the evidence was insufficient to establish that the respondent is incompetent, or whether the clerk adjudges that the respondent is incompetent. We conclude that the trial court erred by dismissing petitioner's appeal, but note that the trial court's ruling was made without the benefit of this opinion, which is the first to directly address the scope of N.C. Gen. Stat. § 35A-1115. We conclude that the trial court's order must be

REVERSED.

Judges STEPHENS and McCULLOUGH concur.

IN THE MATTER OF E.B.

No. COA16-382

Filed 4 October 2016

Termination of Parental Rights—jurisdiction—guardian ad litem—verified termination motion

The trial court did not err by terminating parental rights even though respondent mother alleged the trial court lacked jurisdiction since the guardian ad litem (GAL) did not verify the termination motion. The trial court's statement, the affidavit from the deputy clerk, and the properly verified and file-stamped motion attached to the clerk's affidavit sufficed to show that the GAL filed a verified termination motion.

Appeal by Respondent-Mother from order entered 11 January 2016 by Judge Jeannie Houston and order entered 28 January 2016 by Judge Robert Crumpton in Alleghany County District Court. Heard in the Court of Appeals 19 September 2016.

Kilpatrick Townsend & Stockton LLP, by Phillip A. Harris, Jr. and Susan Holdsclaw Boyles, for Appellee Guardian ad Litem.

James N. Freeman, Jr. for Petitioner-Appellee Alleghany County Department of Social Services.

Richard Croutharmel for Respondent-Appellant-Mother.

DILLON, Judge.

Respondent-Mother ("Mother") appeals from orders ceasing reunification efforts and terminating her parental rights to her minor child, E.B. ("Ed").[1] Because the motion to terminate parental rights was verified and properly invoked the trial court's jurisdiction, we affirm.

In May 2014, the Alleghany County Department of Social Services ("DSS") obtained non-secure custody of Ed and filed a petition alleging he was neglected. The trial court entered an order adjudicating Ed neglected. The trial court also entered a disposition order continuing custody of Ed with DSS and directing Ed's parents to comply with their Family Services Case Plan. In June 2015, the trial court entered an order ceasing reunification efforts between Ed and his father, while also establishing reunification as the permanent plan for Ed and Mother.

Nevertheless, Ed's Guardian ad Litem (the "GAL") moved to terminate Mother and father's parental rights, alleging neglect, failure to correct the conditions that led to Ed's removal from their home, failure to pay a reasonable portion of the cost of care for Ed, dependency, and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2015). DSS filed a response joining the GAL's motion.

After an interim permanency planning hearing, the trial court entered an order ceasing reunification efforts between Mother and Ed, and directed DSS to pursue termination of parental rights if the GAL did not procced on the termination motion. After another hearing on the matter, the trial court entered an order terminating both parents' parental rights to Ed.[2] Mother filed timely notice of appeal from both the order ceasing reunification efforts and the order terminating her parental rights.

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1. The pseudonym "Ed" is used throughout for ease of reading and to protect the juvenile's privacy.

2. Ed's father is not a party to this appeal.

Mother's sole argument on appeal is that the trial court lacked jurisdiction over the termination proceedings as the GAL did not verify the termination motion. *See In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007). In response, the GAL has filed a motion to amend the record on appeal to include a copy of the motion which contains the necessary verification. The GAL has included an affidavit from Deputy Clerk of Court Veronica Williams with the motion to amend. Ms. Williams avers that a verification page was attached to the GAL's termination motion, but that when Mother's appellate counsel requested the court file to prepare the record, the verification was inadvertently retained in the Clerk's office and was not sent as a proper part of the court file. Ms. Williams offers no explanation for how a single page could be mistakenly retained by her office.

Mother objects to the GAL's attempt to amend the record to include a copy of the verified termination motion, contending that it is unclear if the trial court relied upon the verified motion. However, in its order terminating Mother's parental rights, the trial court states that it made its findings of fact "[b]ased upon the verified Motion heretofore filed in this juvenile proceeding[.]" We hold that this statement by the trial court, the affidavit from the deputy clerk, and the properly verified and file-stamped motion attached to the clerk's affidavit, suffice to show that the GAL filed a verified termination motion and that the trial court acted upon that motion. Accordingly, we allow the GAL's motion to amend the record on appeal and reject Mother's argument.

Mother has not challenged the trial court's order terminating her parental rights or the 11 January 2016 order ceasing reunification efforts on any other grounds, and they are hereby affirmed.

AFFIRMED.

Judges McCULLOUGH and ENOCHS concur.

IN RE J.M.

[249 N.C. App. 617 (2016)]

IN THE MATTER OF J.M., A.C. AND R.S-C., PETITIONERS
v.
S.F.M. AND D.N.G., RESPONDENTS

No. COA16-265

Filed 4 October 2016

Termination of Parental Rights—subject matter jurisdiction—wrong county

The trial court lacked subject matter jurisdiction over a parental termination proceeding and thus the order was vacated. The minor child did not reside in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County Department of Social Services.

Appeal by respondent-mother from order entered 19 October 2015 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 September 2016.

Cheri C. Patrick for petitioners-appellees.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant mother.

No brief filed for guardian ad litem.

ZACHARY, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor child, J.M. ("Jacob").[1] Because the trial court lacked subject matter jurisdiction over the termination proceeding, we vacate the order.

On 24 January 2012, one day after Jacob was born, the Durham County Department of Social Services ("DSS") took Jacob into non-secure custody and placed him with Mr. and Ms. C ("petitioners"). According to the nonsecure custody order, DSS met with respondent-mother to help avoid Jacob's placement with petitioners, but "[a]dditional efforts were precluded by the incarceration of [respondent-]

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

mother and the unknown whereabouts of [Jacob's] father." Jacob has resided with petitioners ever since the initial placement.

Respondent-mother, who lived with Jacob's maternal grandmother, did not begin visiting with Jacob until he was six months old. Although petitioners drove respondent-mother to visits with Jacob, they stopped providing transportation assistance when respondent-mother failed to attend visits and stated that she needed a break from visitation. Respondent-mother also lacked independent living skills, and there was concern that Jacob's maternal grandmother would pose a risk to his safety if he was returned to respondent-mother's care.

Consequently, on 28 May 2013, the trial court issued a limited custody order placing Jacob into the guardianship and physical custody of petitioners in order for them to obtain information and services for Jacob, as needed, without unnecessary delay pending a more comprehensive order. It is unclear when Jacob's initial permanency planning hearing was conducted. However, after holding a permanency planning review hearing in May 2013, the trial court entered an order on 16 July 2013 again naming petitioners as guardians and physical custodians of Jacob and setting guardianship as the permanent plan.

Petitioners filed a petition to terminate respondent-mother's parental rights in Durham County District Court on 30 June 2015 alleging the following grounds: (1) willfully leaving Jacob in a placement outside the home for more than 12 months without making reasonable progress, and (2) willful abandonment of Jacob. *See* N.C. Gen. Stat. § 7B-1111(a)(2) and (7) (2015). After a hearing, the trial court entered an order on 19 October 2015 terminating respondent-mother's parental rights to Jacob based on willful abandonment. Respondent-mother timely appealed.[2]

Respondent-mother first argues that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding because the petition was filed in Durham County and Jacob resided in Wake County, was not found in Durham County, and was not in the custody of Durham County DSS or a Durham County child-placing agency at the time the petition to terminate parental rights was filed. Therefore, respondent-mother contends that the order terminating her parental rights should be vacated. We agree.

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2. Although the termination order was entered in October 2015, respondent-mother was not served with the order until 8 January 2016. Thus, her 8 January 2016 written notice of appeal is timely. *See* N.C. Gen. Stat. § 7B-1001(b) (2015).

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007). "The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal." *In re B.L.H.*, ___ N.C. App. ___, ___, 767 S.E.2d 905, 909 (2015). Jurisdiction over termination of parental rights proceedings is governed by N.C. Gen. Stat. § 7B-1101, which provides:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, *or is in the legal or actual custody of a county department of social services* or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101 (2015) (emphasis added).

Here, it is undisputed that Jacob resided with petitioners in Wake County at the time the petition to terminate respondent-mother's parental rights was filed in Durham County District Court. There is no evidence that Jacob was found in Durham County or was in the custody of a child-placing agency in Durham County at the time the petition was filed.

As to DSS custody, Durham County DSS was initially granted custody of Jacob pursuant to a 24 January 2012 nonsecure custody order. However, in the 28 May 2013 limited order and again in the 16 July 2013 permanency planning review order, the trial court placed Jacob in the guardianship and physical custody of petitioners and named guardianship as the permanent plan. The trial court also released DSS and the guardian *ad litem* from "further court responsibility" and waived further review hearings.

Pursuant to N.C. Gen. Stat. § 7B-600, once appointed by a trial court,

> [t]he guardian shall have the care, *custody*, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the Armed Forces

> of the United States, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile.

N.C. Gen. Stat. § 7B-600(a) (2015) (emphasis added).

The 28 May 2013 order removed Jacob from DSS custody and granted custody to petitioners by naming them as the guardians and physical custodians of Jacob. *See id.*; *see also In re J.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009) (noting that by making a couple the guardians for the child, the trial court modified the child's custody from DSS to the couple). Thus, at the time petitioners filed their petition to terminate respondent-mother's parental rights on 30 June 2015, Jacob was not residing in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County DSS. *See* N.C. Gen. Stat. § 7B-1101.

Because none of these requirements were met, the Durham County District Court lacked jurisdiction to hear the termination of parental rights petition. Accordingly, we vacate the order terminating respondent-mother's parental rights.

VACATED.

Judges BRYANT and TYSON concur.

IN THE MATTER OF K.P. & C.P.

No. COA16-295

Filed 4 October 2016

Child Abuse, Dependency, and Neglect—writ of certiorari—adjudication and disposition—appointed counsel

Respondent mother's petition for writ of certiorari was allowed in a neglected and dependent juveniles case for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders were vacated. The case was remanded for a new hearing on the petition filed by DSS in 15 JA 63 with regard to Carl and to hold a hearing to determine respondent's eligibility and desire for appointed counsel.

IN RE K.P.

[249 N.C. App. 620 (2016)]

Appeal by respondent-mother from order entered 20 November 2015 by Judge Joseph Moody Buckner and order entered 24 November 2015 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 7 September 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

W. Michael Spivey for respondent-appellant mother.

Battle Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

ZACHARY, Judge.

Respondent-mother ("respondent") appeals from an order denying her motion to vacate an order that had adjudicated respondent's children "Kate" and "Carl"[1] to be neglected and dependent juveniles. Although respondent failed to appeal in a timely fashion from the underlying order adjudicating the children to be neglected and dependent, we have granted respondent's petition for a writ of certiorari in order to reach the merits of her appeal. Respondent also appeals from a permanency planning order. For the reasons discussed below, we reverse the adjudication and disposition order, vacate all subsequent orders resulting from that order, and remand for further proceedings with respect to Carl.[2]

I. Factual and Procedural History

On 14 July 2015, the Orange County Department of Social Services ("DSS") filed juvenile petitions alleging that 17-year-old Kate and 13-year-old Carl were neglected and dependent. The petitions alleged that respondent was "abusing or misusing" anti-anxiety and pain medications, and that on 2 April 2015, respondent had been involuntarily committed to UNC Hospital for several days. In addition, the petitions alleged that Kate and Carl did not want to live with respondent until she was treated for substance abuse. Judge Joseph Moody Buckner conducted a hearing on the petitions on 6 August 2015. On 27 August 2015, Judge Buckner entered an order that adjudicated Kate and Carl to be

1. We use these pseudonyms to protect the juveniles' privacy.

2. Kate reached the age of majority in June 2016 and is no longer within the jurisdiction of the juvenile court. *See* N.C. Gen. Stat. § 7B-201(a) (2015).

neglected and dependent, placed them in the legal and physical custody of respondent's brother, "Mr. R.," and scheduled a permanency planning hearing for 5 November 2015.

On 14 September 2015, respondent, who was then represented by appointed counsel James E. Tanner, III, filed a *pro se* motion seeking the removal of her court-appointed counsel and asking the court to vacate the adjudication and disposition order due to "lack of consent, misrepresentation/facts not presented to the Court, and ineffective assistance of counsel." Respondent's motions were first heard by Judge Beverly Scarlett on 1 October 2015. At that hearing, Judge Scarlett told respondent that if the court removed Mr. Tanner, she would then be left with the choice of retaining private counsel or proceeding without counsel. Although the record contains no ruling on respondent's motion for removal of her appointed counsel, respondent proceeded without the assistance of counsel after the 1 October 2015 motion hearing. Judge Scarlett continued the hearing on the motion to vacate the adjudication order until it could be heard by Judge Buckner.

Judge Buckner held a hearing on respondent's motion to vacate the adjudication order on 22 October 2015, and entered an order denying respondent's motion on 20 November 2015. On 5 November 2015, after the hearing on respondent's motion to vacate the order for adjudication and disposition but before the entry of Judge Buckner's order denying respondent's motion, Judge Scarlett conducted a permanency planning hearing. On 24 November 2015, Judge Scarlett entered a permanency planning order that established a permanent plan of guardianship for Kate and Carl and appointed Mr. R. as their guardian. The order granted respondent supervised visitation with the children, declared the case "closed to further reviews" and released DSS and the guardian *ad litem* from their involvement in this matter.

Respondent filed timely notice of appeal from the order denying her motion to vacate the adjudication order and from the permanency planning order. However, respondent failed to enter a timely notice of appeal from the underlying order for adjudication and disposition. Counsel appointed to represent respondent on appeal has filed a petition for writ of certiorari asking this Court to review the original adjudication order entered on 27 August 2015. N.C.R. App. P. 21(a)(1) (2015) provides that the "writ of certiorari may be issued in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action[.]" Our courts have generally interpreted the term "appropriate circumstances" in Rule 21(a) to mean that "the right of appeal has been lost through no fault of the petitioner[,]" *Johnson v. Taylor*, 257

N.C. 740, 743, 127 S.E.2d 533, 535 (1962), and "that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). Ultimately, however, our decision to issue the writ is discretionary. *State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005). In this case, the record shows that respondent lost her right of appeal through no fault of her own and, as discussed below, we conclude that respondent has shown error by the trial court. In our discretion, we allow her petition for writ of certiorari to review the order.

II. Order of Adjudication and Disposition

On appeal, respondent argues that the court erred by entering the order adjudicating her children to be neglected and dependent, on the grounds that the trial court neither conducted a proper adjudicatory hearing nor properly established respondent's consent to the adjudication. We conclude that respondent's argument has merit.

A. Legal Principles and Standard of Review

When a juvenile is alleged to be abused, neglected, or dependent, N.C. Gen. Stat. § 7B-802 (2015) requires the court to conduct an "adjudicatory hearing" in the form of "a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." "In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." *Id.* "[T]he allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015). Moreover, the trial court may accept a stipulation to adjudicatory facts only as follows:

> A record of specific stipulated adjudicatory facts shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.

N.C. Gen. Stat. § 7B-807(a) (2015).

"An adjudication of abuse, neglect or dependency in the absence of an adjudicatory hearing is permitted only in very limited circumstances." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002). N.C. Gen. Stat. § 7-801(b1) (2015) authorizes the court to enter "a consent adjudication order" only if: (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile

is represented by counsel; and (3) the court makes sufficient findings of fact.

N.C. Gen. Stat. § 7B-807(b) (2015) requires that an "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." " '[T]he trial court's findings must consist of more than a recitation of the allegations' contained in the juvenile petition. '[T]he trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law.' " *In the Matter of S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 711-12 (2011) (quoting *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal quotation omitted)). In addition:

> In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. . . . [However,] the trial court may not delegate its fact finding duty. Consequently, the trial court should not broadly incorporate these written reports from outside sources as its findings of fact.

In re J.S., 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (citing *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003), and *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). On appeal from an adjudication of neglect, abuse, or dependency, this Court must "determine '(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008).

B. Discussion

The record on appeal shows that the parties attended a Child Planning Conference on 21 July 2015, and that a report submitted by DSS to the trial court indicated that a "Consent Agreement could not be reached" at the conference. The case was scheduled for adjudication and disposition on 6 August 2015. The entire adjudication hearing consisted of the following exchange between the trial court and counsel:

> [DSS COUNSEL]: Handing up the reports in [Kate and Carl's] case and I understand there's a consent.
>
> THE COURT: Okay. I appreciate everybody's consent and hard work in this case. It's going to work out fine. We'll

approve the placement as recommended by [the guardian *ad litem*] and [the DSS social worker]. And we need a three-month [hearing] date.

[FATHER'S COUNSEL]: Oh. Your Honor, if I could be heard.

THE COURT: Of course.

[FATHER'S COUNSEL]: Yes, Your Honor. [Father] is in agreement with the children being with Mr. [R]. He has a couple of concerns. One being that there is a fairly substantial amount of money that comes to - that the children get by virtue of his disability. And that money is still going to Mother—

THE COURT: And it's going to change.

. . . .

[COUNSEL FOR FATHER]: . . . Okay. And also, just to specify that he can have unsupervised visitation at the permission—- at the desire of the children. . . .

. . . .

[COUNSEL FOR DSS] And how should the order read with regards to the children's disability benefits?

THE COURT: That [Mr. R. will] become the payee and recipient.

. . .

MR. TANNER: Your Honor. So my client has a couple of requests. She's willing to comply with the recommendations. She would like to have some ability to have further visitation.

THE COURT: Well, there's nothing restricting her from that.

MR. TANNER: Okay.

THE COURT: There won't be anything in the order doing that.

MR. TANNER: There won't be anything restricting it?

THE COURT: No.

. . . .

> MR. TANNER: Second issue as it says: That [Father] is to assist with providing transportation. I was informed that there was some history of substance use, drunk driving, prior custody orders from some years past.
>
> . . . .
>
> THE COURT: Everybody that's providing transportation have a license and insurance. How about that?
>
> . . .
>
> THE COURT: Okay. Have a license and insurance and not be impaired.
>
> MR. TANNER: Okay.
>
> THE COURT: Or using. All right? Thank you.

The hearing concluded with counsel for DSS announcing a subsequent hearing date of 5 November 2015.

The order of adjudication and disposition recites that its findings of fact are being made "based on clear, cogent and convincing evidence" and that the court's conclusions are based on these findings of fact. However, the trial court received no testimony at the 6 August 2015 hearing, and the parties did not stipulate to any adjudicatory facts pursuant to N.C. Gen. Stat. § 7B-807(a). Instead, the adjudication of the minor children as neglected and dependent was supported solely by two written reports submitted by DSS at the hearing. As a result, the trial court's findings of fact consist of recitations from the facts alleged in the petitions and wholesale incorporation of reports prepared by DSS. We conclude that the trial court entered its adjudication order without conducting an adjudicatory hearing as required by N.C. Gen. Stat. § 7B-802.

We further conclude that the order for adjudication and disposition is not a valid consent order and did not meet the requirements of N.C. Gen. Stat. § 7-801(b1). The order contains no findings stating that the parties had stipulated to adjudicative facts or had consented to the children being adjudicated as neglected and dependent. Nor is there any evidence that a consent order had been drafted for the parties' agreement. In sum, the record contains no evidence that the parties had reached a consent agreement or that respondent had consented to her children being adjudicated as neglected and dependent.

In *In re J.N.S.*, 207 N.C. App. 670, 678, 704 S.E.2d 511, 517 (2010), the record showed that the *respondent's* attorney had drafted a proposed consent order. In addition, the parties were informed in open court that the trial court intended to enter an adjudication order based upon the consent of the parties. In that factual context, this Court held that the respondent's failure to object to entry of the consent order constituted a waiver of the right to challenge the order on appeal. In contrast, in the present case, there is no evidence in the record that a consent agreement had been reached for adjudication or that a consent order had been drafted. Moreover, although the attorney for DSS and the trial court referred to "consent" several times, none of those present stated the nature of the purported "consent" for the record. Specifically, neither of the parties' attorneys nor the trial court ever stated that respondent was consenting to the adjudication of her children as neglected and dependent.[3]

"As the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 396 (2000) (citation omitted). In the present case, the adjudication and disposition order neither resulted from a proper adjudicatory hearing under N.C. Gen. Stat. § 7B-802, nor met the requirements of a valid consent adjudication order under N.C. Gen. Stat. § 7B-801(b1). Therefore, we reverse the order and remand to the trial court for further proceedings as to Carl.

III. Remaining Issues

As we have reversed the trial court's order for adjudication and disposition, we vacate the orders based upon the adjudication order, including the order that denied respondent's motion to vacate the adjudication order and the 24 November 2015 permanency planning order. Accordingly, we need not address respondent's arguments challenging these orders.

Respondent also argues that the court erred by treating her motion for removal of her court-appointed counsel as a waiver of her right to

3. Respondent's attorney stated that respondent had agreed to "comply with the recommendations." We conclude that this was likely a reference to the "recommendations" in respondent's case plan, as there is no evidence in the record that any party had "recommended" that respondent consent to the adjudication.

appointed counsel under N.C. Gen. Stat. § 7B-602(a) (2015) and by requiring her to proceed *pro se* without conducting the inquiry mandated by N.C. Gen. Stat. § 7B-602(a1). As we have reversed the underlying order for adjudication and disposition and have vacated the subsequent orders arising from that order, we find it unnecessary to reach this issue.

IV. Conclusion

Respondent's petition for writ of certiorari is allowed for the purpose of reversing the order for adjudication and disposition entered on 27 August 2015. All subsequent orders entered by the trial court, including the permanency planning order entered on 24 November 2015, are hereby vacated. We remand the cause for a new hearing on the petition filed by DSS in 15 JA 63 with regard to Carl. The trial court shall hold a hearing to determine respondent's eligibility and desire for appointed counsel in accordance with N.C. Gen. Stat. § 7B-602.

REVERSED AND REMANDED IN PART; VACATED IN PART.

Judges BRYANT and TYSON concur.

IN THE MATTER OF L.Z.A.

No. COA16-200

Filed 4 October 2016

1. Child Abuse, Dependency, and Neglect—findings of fact —sufficiency

The trial court's finding of fact 3 in a child abuse and neglect case, with the exception of finding of fact 3(i), was supported by clear and convincing competent evidence. To the extent that finding of fact 3(i) was not supported by clear and convincing competent evidence, there was no prejudicial error.

2. Child Abuse, Dependency, and Neglect—adjudication

The trial court did not err by adjudicating the minor child abused and neglected where the child sustained unexplained, non-accidental injuries while in respondent parents' custody. The Department of Social Services was not required to rule out every remote possibility or prove abuse beyond a reasonable doubt.

3. Child Visitation—visitation plan—memorialized in previous court order

The trial court did not abuse its discretion in a child abuse and neglect case by allegedly failing to set out a minimum visitation plan. The current visitation plan was memorialized in the trial court's previous order.

4. Child Abuse, Dependency, and Neglect—reunification plan—concurrent plan of adoption

The trial court did not abuse its discretion in a child abuse and neglect case by implementing a concurrent plan of adoption in addition to the reunification plan. Assuming arguendo it was error, there was no prejudice.

Appeal by Respondent-Mother and Respondent-Father from order entered 25 November 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 19 September 2016.

Christopher C. Peace for Petitioner-Appellee Mecklenburg County Department of Social Services, Youth and Family Services.

N. Elise Putnam for Appellant-Respondent Mother.

Miller & Audino, LLP, by Jay Anthony Audino, for Appellant-Father.

Ellis & Winters LLP, by James M. Weiss, for the Guardian ad Litem.

DILLON, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively referred to as "Parents") appeal from an order adjudicating L.Z.A. ("Lisa")[1] abused and neglected and continuing custody with the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS"). After careful review, we affirm.

I. Background

The instant action stems from a report YFS received alleging that four-month-old Lisa had been admitted to the hospital on either

1. The pseudonym "Lisa" along with other pseudonyms are used throughout.

3 December 2014 or 4 December 2014 with bilateral bleeding in the brain, a shifting of the brain off of the midline, and a skull fracture. Lisa was in Parents' custody when she sustained these injuries. Due to the nature of her injuries, medical personnel performed a non-accidental trauma ("NAT") series on Lisa, which revealed that Lisa had fractured her arm around the same time she sustained her other injuries.

Parents' recount of the events leading up to Lisa's admission to the hospital is as follows. During the week of Thanksgiving,[2] Mother noticed that Lisa was behaving differently—Lisa appeared sad, angry, and uncomfortable. This behavior continued after Thanksgiving. In addition, Lisa began drinking less milk. On 1 December 2014, Parents took Lisa to the hospital because she was sweating and had a fever. Lisa was discharged and prescribed an antibiotic.

When Lisa's condition failed to improve, Parents took her to a different hospital. Lisa was admitted with vomiting and a fever, and a computerized topography ("CT") scan revealed bilateral subdural hematomas and a linear left parietal skull fracture. Lisa's attending examiner opined that the "constellation of findings raises the possibility of non-accidental trauma." Due to the possibility of non-accidental trauma, Lisa was given a full skeletal survey. In addition to the left skull fracture, the skeletal survey revealed a linear right parietal fracture. The skeletal survey also revealed a "healing fracture of the distal left humerus."

On 8 December 2014, Dr. Marc Mancuso, a pediatric radiologist, reviewed the CT scan results and skeletal survey. His observations regarding the fractures to the back of Lisa's head are as follows: "[t]here was a linear fracture of the left parietal calvarium . . . that also involved a suture -- that's where bones of the head are separate -- and another fracture on the other side which may have been connected through the sutures to the fracture on the right side." He was unsure whether Lisa had two distinct fractures or one fracture that "communicate[d] through a suture." Dr. Mancuso opined that "either a blow to the skull or the skull being struck against a hard object" was the cause of the skull fracture. Dr. Mancuso reasoned that the fracture(s) could have been caused by a fall only if Lisa fell over three feet onto a hard surface.

Dr. Mancuso also explained that Lisa had a fracture to her left humerus, the large bone of her upper arm. He noticed some new bone formation, which indicated that Lisa's arm was healing. The arm fracture was above the elbow; Dr. Mancuso noted that fractures of these sorts in

2. This Court takes judicial notice that Thanksgiving Day fell on 27 November 2014.

infants are most commonly caused by twisting or bending the joint. Dr. Mancuso concluded that "infants of [Lisa's] age are not able to cause fractures of this sort under their own power."

After reviewing the skeletal survey, Dr. Mancuso determined that Lisa's arm fracture was "highly specific for nonaccidental trauma," and that the additional skull fracture "increases specificity." He opined that the injuries occurred anywhere from one to three weeks prior to the skeletal survey.

On 15 December 2014, Lisa was discharged from the hospital. On 17 March 2015, she had a CT scan, which appeared to indicate recent brain bleeding. It was later determined that this bleeding resulted from her original injuries. Another CT scan conducted on 28 April 2015 indicated that Lisa's brain injuries were improving, with no recent bleeding.

Parents affirmed that they were Lisa's sole caregivers at all relevant times. After Lisa's birth in August 2014, Mother returned to work shortly thereafter, and a neighbor named "Doris" cared for Lisa. Doris, however, stopped caring for Lisa during the last week of October. Father was out of town working when Lisa was born. He returned to North Carolina for two weeks shortly after her birth, and then left again. Father returned home on 14 November 2014 and was Lisa's sole caregiver after his return. Doris did not provide any babysitting for Lisa in November 2014.

Father indicated that a woman named "Ana" babysat Lisa on one occasion after Thanksgiving while he was attempting to purchase a house. Father's testimony appeared to waver on the exact date Ana babysat Lisa. Nevertheless, Father testified that Ana did not babysit Lisa at any time between 14 November 2014 and Thanksgiving.

During the Thanksgiving holiday, Parents visited other family members at a relative's house. Mother held Lisa for the majority of the visit due to Lisa's discomfort. While Father's ten-year-old daughter was present during the visit, she never had any unsupervised time with Lisa.

On 8 December 2014, YFS interviewed Parents separately; however, neither Mother nor Father had any explanation for Lisa's injuries. They denied that Lisa had fallen, been dropped or thrown, endured trauma, or been mistreated in any way.

In December 2014, YFS filed a petition alleging that Lisa was abused and neglected. The petition alleged, among other things, that the medical findings were consistent with non-accidental trauma, that the cause of Lisa's injuries was unknown, and that Parents were Lisa's sole caregivers

during the relevant time period. YFS was granted non-secure custody of Lisa, after which Lisa was placed with Father's ex-girlfriend.

On 25 November 2015, the trial court entered an order adjudicating Lisa abused and neglected. The trial court also concluded that it was in Lisa's best interest to remain in YFS custody. Parents appeal.

II. Standard of Review

Review of a trial court's adjudication of dependency, abuse, and neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citation omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

III. Analysis

A. Finding of Fact 3 is Largely Supported by Competent Evidence

[1] We first address Parents' challenge of finding of fact 3, which provides as follows:

> a. On December 8, 2014, [YFS] received a referral alleging that this child had been admitted to CMC-Levine Children's Hospital in the late evening of December 3 or early morning of December 4. The juvenile was found to have bilateral bleeding in the brain, a shifting of the brain off the midline (line from the crown of one's head down to the tip of one's nose) and a skull fracture. The referral further stated that an NAT (non-accidental trauma) series was going to be performed.
>
> b. On December 8, 2014, medical personnel at Levine informed [YFS] that on or about December 1, 2014, the child had been taken to CMC-Pineville and was treated and released, that the child was currently responsive to stimuli, that the parents had no explanation for the injuries that led to this referral, and that there was a ten-year-old sibling that visited the

parents and this child but that the sibling did not have unsupervised time with this child.

c. On that same day, the parents were interviewed separately. . . . Their sentiments were similar to those expressed to [YFS] by the medical personnel.

d. Prior to the above incident, the parents brought the child to the hospital due to a fever and vomiting, and the hospital released the child with medication. The parents later brought the child back when she was not improving.

e. The juvenile was also exposed to out-of-state relatives with small children during the time that she was injured, but the juvenile was supervised at all times.

f. A CT scan performed on December 8, 2014 indicated that the child had subdural hematomas (bleeding on the brain) on the left side and on the right side of her brain that were at least a week old, that the size of the hematomas caused a shift of her brain off of her midline by approximately 5 millimeters, and that there was evidence of a linear left parietal skull fracture (approximately the back part of the skull behind left ear).

g. The NAT series indicated the following: the child had a right parietal skull fracture and a left humeral (upper arm) fracture. It was undetermined whether the right parietal skull fracture was part of the same fracture as the above-noted left parietal skull fracture or whether it was a separate fracture.

h. The findings noted by the medical personnel were consistent with non-accidental trauma.

i. Dr. Marc Mancuso testified, and this Court finds, that the fracture to the child's arm could not be caused by the child. The child's arm fracture was in a healing stage at the time of her hospitalization, indicating it had occurred prior to the skull fracture.

j. At this time, it is not known how the child sustained the aforesaid injuries. Per the parents, the child did have [Doris] as a babysitter. However, the Court finds

> that the babysitting timeframe did not coincide with the injuries timeframe as determined by medical personnel nor did any injuries manifest themselves during that babysitting time.
>
> k. [CMPD] has been investigating the matter, including subjecting the parents to lie detector tests, but neither parent has been charged with any criminal offenses.
>
> l. The parents identified an alternative placement for the juvenile prior to the petition being filed.

We now review Parents' specific arguments regarding the subsections of finding of fact 3 in turn.

1. Parents' Argument that Certain Findings Are Invalid Because They Are Recitations of Petition Allegations Fails

Mother argues that many of these findings do not support the abuse and neglect adjudications as they are verbatim, or near verbatim, recitations of the allegations in the petition. "When a trial court is required to make findings of fact, it must find the facts specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (internal quotation marks omitted). "Thus, the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' " *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (quoting *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337). Consequently, "the trial court's findings must consist of more than a recitation of the allegations" contained in the juvenile petition. *O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853.

However, "it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015). As we noted in *In re J.W.*:

> [T]his Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

Id.

We acknowledge that several of the trial court's findings are verbatim recitations of the petition allegations. However, after reviewing the record, we are satisfied that "the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *Id.*

First, the order contains additional, substantive findings of fact that do not track the language of the petition allegations. Second, the trial court made its findings following several days of witness testimony and admitting medical records. Lastly, the trial court's interactions with the parties during the hearing demonstrates that the court engaged in an independent, decision-making process in rendering its findings. At the close of the adjudicatory phase of the hearing, the trial court announced that it was "taking the matter under advisement to issue both its ruling with regard to the adjudication and specific findings." In between the adjudication and disposition hearings, the trial court and the parties apparently discussed a proposed order, and the court even modified a proposed finding of fact at Father's request. At the outset of the disposition hearing, the trial court discussed this modification with the parties, asked if they wished to be heard, and finalized the order. We are satisfied that the trial court's order is not invalidated due to some of the findings mirroring language in the petition.

2. Finding of Fact 3(e) is Supported by Competent Evidence

In finding of fact 3(e), the trial court found that "[t]he juvenile was also exposed to out-of-state relatives with small children during the time that she was injured, but the juvenile was supervised at all times." Mother admits that she and Father visited with out-of-state relatives on Thanksgiving, but avers that Lisa began acting differently prior to that date. Thus, Mother appears to take issue with any inference that Lisa's injuries occurred on Thanksgiving Day. Mother's contention is ultimately irrelevant. Dr. Mancuso testified that the injuries occurred anywhere from one to three weeks prior to the 8 December 2014 skeletal survey. Therefore, Thanksgiving Day was included as a possible date of injury. Furthermore, both a police officer and YFS social worker testified that Lisa was never unsupervised during the family's visit with out-of-state relatives on Thanksgiving Day. Therefore, even if Parents are to be believed, this finding is still supported by the evidence on record.

3. Finding of Fact 3(h) is Supported by Competent Evidence

In finding of fact 3(h), the trial court found that "[t]he findings noted by the medical personnel were consistent with non-accidental trauma."

Father argues that this finding of fact is not supported by evidence as neither Parents nor the medical professionals could pinpoint the cause or date of Lisa's injuries. Father offers a number of speculative "what-ifs" as to the cause of Lisa's injuries and essentially asks this Court to re-weigh the evidence. The trial court's finding, however, is directly supported by Dr. Mancuso's testimony, and it is not our duty to re-weigh the evidence. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). We disregard this challenge.

4. Finding of Fact 3(i) is Not Supported by Competent Evidence, However This Error is Non-Prejudicial

Parents challenge finding of fact 3(i), which provides that "[t]he child's arm fracture was in a healing stage at the time of her hospitalization, indicating it had occurred prior to the skull fracture." Parents argue that this finding is not supported by the evidence as Dr. Mancuso could not narrow down a specific time frame for the fractures and testified that it was "possible they all occurred at roughly the same time." It is true that Dr. Mancuso's testimony does not appear to support this finding. However, the record establishes that Lisa sustained multiple non-accidental injuries; therefore, pinpointing the precise time these injuries occurred is not necessary to sustain the trial court's adjudications. Accordingly, we find no prejudicial error in this finding.

5. Finding of Fact 3(j) is Supported by Competent Evidence

Finding of fact 3(j) provides that while Doris was Lisa's babysitter, "the babysitting timeframe did not coincide with the injuries timeframe as determined by medical personnel nor did any injuries manifest themselves during that babysitting time." Parents aver that this finding of fact is not supported by the evidence as Dr. Mancuso could not pinpoint the date of the injuries and could only give a range of several weeks. Again, we are not persuaded by this argument, and conclude that this finding is supported by the evidence. Father testified that Doris last babysat for Lisa in October 2014. Dr. Mancuso opined that the injuries occurred anywhere from one to three weeks prior to the skeletal survey, which would have included the last two weeks in November 2014. There is clear and convincing evidence supporting this finding.

In conclusion, we hold that the trial court's findings, with the exception of finding of fact 3(i), are supported by clear and convincing

competent evidence. To the extent that finding of fact 3(i) is not supported by clear and convincing competent evidence, we find no prejudicial error.

B. The Abuse and Neglect Adjudications Were Warranted

[2] We now turn to Parents' arguments regarding the trial court's abuse and neglect adjudications.

1. The Abuse Adjudication is Warranted

Parents contend that the trial court erred in concluding that Lisa was abused. An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C. Gen. Stat. § 7B-101(1) (2015). Parents contend that the findings of fact and evidence do not support an abuse adjudication as: (1) the medical experts had no definitive time frame or explanation for Lisa's injuries, and (2) there is no indication that there was or has been a pattern of abuse or any risk factors for abuse, such as domestic violence, substance abuse, or mental illness. Parents also argue that Lisa's injuries might have been caused by an accident. We hold that the trial court did not err in adjudicating Lisa abused.

This Court has previously upheld abuse adjudications where a child sustains unexplained, non-accidental injuries. *See*, *e.g.*, *In re C.M.*, 198 N.C. App. 53, 60-62, 678 S.E.2d 794, 798-800 (2009) (affirming abuse adjudication where the findings of fact established that the juvenile sustained a head injury that doctors testified was likely non-accidental, despite the fact that there was uncertainty as to when or how the injury occurred). *See also State v. Wilson*, 181 N.C. App. 540, 543, 640 S.E.2d 403, 406 (2007) ("[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." (alteration in original) (internal quotation marks omitted)). The caselaw does not require a pattern of abuse or the presence of risk factors.

The findings of fact and evidence establish that Lisa sustained bilateral skull fractures, subdural hematomas, and an arm fracture. Medical personnel, including an expert witness at the hearing, determined that Lisa's injuries were likely the result of "non-accidental trauma." Parents offered no explanation for Lisa's injuries and were her sole caretakers at the time she sustained the injuries. Based on the time frame established by Dr. Mancuso, the injuries could not have occurred when Doris

was Lisa's caregiver. While Father testified that Lisa was cared for by Ana the day after Thanksgiving, Parents' own testimony indicates that Lisa's symptoms predated Thanksgiving. Thus, the findings of fact demonstrate that Lisa sustained severe, unexplained, non-accidental injuries while in Parents' custody. YFS was not required to rule out every remote possibility; nor was it required to prove abuse beyond a reasonable doubt. The trial court's findings of fact are sufficient to establish abuse.

2. Neglect Adjudication is Warranted

Likewise, Parents challenge the trial court's neglect adjudication. A neglected juvenile is defined as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15). This Court has consistently required that "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (alteration in original) (internal quotation marks omitted).

Here, the evidence supporting the abuse adjudication also supports the neglect adjudication. *See T.H.T.*, 185 N.C. App. 337, 345–46, 648 S.E.2d 519, 525 (2007). Lisa's unexplained, non-accidental injuries while in Parents' custody establish that: (1) she either failed to receive proper care, supervision, or discipline from Parents or lived in an environment injurious to her welfare; and (2) she was physically impaired as a result. We therefore hold that the trial court's neglect adjudication is supported by clear and convincing competent evidence.

C. The Trial Court's Failure to Set Out a Minimum Visitation Plan in the Disposition Order was not an Abuse of Discretion

[3] Parents argue that the trial court abused its discretion by failing to set out a minimum visitation plan. Visitation in juvenile matters is governed by N.C. Gen. Stat. § 7B–905.1, which provides as follows:

> If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised. Unless the court orders otherwise, the director shall have discretion to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances.

N.C. Gen. Stat. § 7B-905.1(b) (2015). Here, the trial court made the following dispositional finding of fact regarding visitation:

> Visitation shall take place as follows: ***Supervised in accordance with the current plan***. YFS has discretion to expand the supervised visitation, with GAL input. If therapeutic guidance is needed, YFS shall obtain that. YFS may explore the paternal aunt for provision of the supervision, as well as the current placement providers.

Parents argue that this finding of fact violates § 7B-905.1(b) because it fails to provide specific information regarding the frequency and length of visits. Parents, however, overlook the fact that this finding of fact provides that visits would occur "in accordance with the current plan." The current visitation plan was memorialized in the trial court's previous order, which provided the following:

> Parents shall have visits on Tuesdays and Saturdays from 12 pm to 2 pm at a YFS facility. YFS/parents have discretion to modify the dates and times of visits as needed. YFS has discretion to expand visitation. The parents may also have an extended visit on Christmas Day. Parents visitation are to be supervised.

Viewing these two orders in conjunction, it is clear that the visitation plan authorizes supervised, twice-weekly two-hour visits with Parents. *See J.W.*, ___ N.C. App. at ___, 772 S.E.2d at 255 (affirming a disposition order's visitation plan as the disposition order provided that all previous orders remained in full force and effect unless specifically modified, and a prior court order specified the frequency and duration of visits). These provisions satisfy the requirements of N.C. Gen. Stat. § 7B-905.1(b), and we therefore find no abuse of discretion.

D. The Trial Court Did Not Err in its Implementation of a Concurrent Adoption Plan

[4] Finally, Father argues that the trial court erred by implementing a concurrent plan of adoption in addition to the reunification plan. In the decretal portion of the trial court's disposition order, the trial court ruled that "[t]he plan of care shall be reunification. . . . The concurrent plan of care shall be adoption." At the hearing, the trial court elaborated on this issue:

> The Court will still remind all the parties that the Court still has pause and concern as there has not been any identified perpetrator in this matter. The Court is providing that the recommendations be adopted with the Department maintaining legal and physical custody. Will note, both [Mother] and [Father], your cooperation at least with the Department and your follow-up on the plan. So the Court was glad to see that.
>
> The Court adopts the goal for reunification with a concurrent goal of the TPR/adoption.

Father's argument appears to be that the trial court's implementation of a concurrent adoption plan runs afoul of N.C. Gen. Stat. § 7B-901(c)(2015), which permits a trial court at disposition to "direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to [one of several aggravating factors]." Father submits that none of the aggravating factors were present in this case, and that the trial court's order therefore violated N.C. Gen. Stat. § 7B-901(c). However, the trial court did not cease reunification efforts and therefore was not required to make written findings of fact regarding the presence of one or more aggravating factors. On the contrary, the trial court adopted reunification as the primary plan and even suggested that reunification could begin after expanded visitation. Hence, the record establishes that the trial court did not attempt to cease reunification pursuant to N.C. Gen. Stat. § 7B-901(c).

Father also contends that the trial court erred in implementing a concurrent adoption plan as the trial court neglected to make the necessary findings under the section of our Juvenile Code governing permanency planning hearings. We find no error.

Specifically, Father argues that the trial court's order never made the following findings: (1) whether reunification efforts would be futile or inconsistent with the juvenile's need for a safe, permanent home within a

reasonable period of time; (2) when and if termination of parental rights should be considered; (3) whether it was possible for the juvenile to be returned home within the next six months; (4) whether guardianship should be established; and (5) whether adoption should be pursued. *See* N.C. Gen. Stat. § 7B-906.1(d)(3), (6), (e)(1)-(3). Father, however, overlooks the fact that the trial court was conducting a disposition hearing rather than a permanency planning hearing, and therefore was not required to issue the findings of fact required under Section 7B-906.1(d) and Section 7B-906.1(e). Accordingly, the trial court did not err in failing to issue these findings.

Lastly, Father argues that the trial court's order was erroneous as Parents' actions did not support a plan of adoption. We disagree.

"The district court has broad discretion to fashion a disposition . . . based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). We review a trial court's disposition order only for an abuse of discretion. *Id.* "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (internal quotation marks omitted). Here, the trial court implemented a concurrent adoption plan due to the court's concern that a perpetrator still had not been identified. The trial court's order was based on a reasoned decision.

Furthermore, assuming, *arguendo*, that the trial court's implementation of a concurrent adoption plan was erroneous, Father cannot show prejudice. The primary plan of care was still reunification and Parents were still receiving services pursuant to a case plan. Father fails to establish that YFS is actively pursuing adoption. Lastly, we note that because the trial court ordered Lisa to remain in the custody of YFS, it is required to hold permanency planning hearings in accordance with Section 7B-906.1 and Section 7B-906.2 and make the requisite findings of fact at that time. We therefore discern no prejudicial error on the part of the trial court.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in adjudicating Lisa abused and neglected. Accordingly, we affirm the trial court's disposition order.

AFFIRMED.

Judges McCULLOUGH and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
ADAM ROBERT JACKSON, DEFENDANT

No. COA15-876

Filed 4 October 2016

1. Appeal and Error—failure to indicate appeal from judgment suspending sentence—petition for writ of certiorari granted

Where defendant's notice of appeal failed to indicate that he was appealing from the Judgment Suspending Sentence entered against him as a result of his plea of no contest, as was required by N.C.G.S. § 15A-979(b)—instead only indicating that he was appealing from the order denying his motion to suppress—the Court of Appeals granted defendant's petition for writ of certiorari to review the appeal on the merits.

2. Search and Seizure—substantial basis for warrant—informant

Where the trial court denied defendant's motion to suppress and defendant pled no contest to one count of manufacturing marijuana, the Court of Appeals held that the warrant application provided a substantial basis to support the magistrate's finding of probable cause. The information provided by the informant was obtained first-hand, it was against the informant's penal interest, it was timely and not stale, and it was adequately corroborated by the investigating officers.

Judge HUNTER, JR. concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 11 February 2015 by Judge Joseph N. Crosswhite in Alexander County Superior Court. Heard in the Court of Appeals 14 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph A. Newsome, for the State.

Gerding Blass, PLLC, by Danielle Blass, for Defendant-Appellant.

INMAN, Judge.

Adam Robert Jackson ("Defendant") appeals from a Judgment Suspending Sentence following his plea of no contest to one count of

manufacturing marijuana. On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence obtained pursuant to a search warrant because the warrant application was insufficient to support the magistrate's finding of probable cause. After careful review, we hold that the warrant application provided a substantial basis to support the magistrate's finding of probable cause. Accordingly, we affirm.

I. Factual & Procedural Background

On 30 January 2013, Detective Jessica Jurney and another officer with the Narcotics Division of the Iredell County Sheriff's Office conducted a knock-and-talk at the home of a person they had never met. The officers indicated to the person that she could face criminal charges based on her[1] possession of marijuana. The person ("confidential informant" or "informant") agreed to provide information regarding where she obtained the marijuana. The informant told Detective Jurney that she had purchased marijuana from Defendant, a male in his early 20s, "with long dark hair."

The informant provided Defendant's name, stated that she had purchased marijuana at Defendant's residence on multiple occasions, and noted that she had most recently purchased marijuana from Defendant at his residence two days earlier. The informant explained that during her most recent purchase, Defendant asked her to wait for him in a front room and went into a bedroom located on the right side of his house. The informant then heard the sound of a key turning in a lock. Defendant returned with a mason jar containing marijuana and sold a portion of it to the informant.

The informant told Detective Jurney that Defendant's residence was located off Old Mountain Road in a wooded area across from a development called "Old Mountain Village." The informant described Defendant's home as a "modular home/trailer." The informant then led Detective Jurney to a driveway with a mailbox marker that read 2099 Old Mountain Road. The informant explained to Detective Jurney that the driveway forked in two separate directions at the end and stated that Defendant's residence was located on the left side of the fork. Subsequently, Captain Clarence Harris of the Iredell County Sheriff's Office drove to the same location and confirmed that a light-colored modular home was located on the left side of a fork in the driveway.

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1. Defendant's brief notes that the suppression hearing seemed to indicate that the confidential informant was female. For this reason, and for ease of reading, we will refer to her as such in this opinion.

Detective Jurney searched the CJ LEADS database, a database wherein law enforcement officers can refer to DMV information or criminal charges, for "Adam Jackson." The search revealed that a person named "Adam Robert Jackson" resided at 2099 Old Mountain Road in Hiddenite, North Carolina, and was twenty-two years old. In the photograph, Adam Jackson had shoulder length brown hair and brown eyes.

On 31 January 2013, Detective Jurney contacted Deputy Kelly Ward of the Narcotics Division of the Alexander County Sheriff's Office. Because the address was located in Alexander County, Detective Jurney notified Deputy Ward of all of the information that had been relayed to her by the informant. On that same day, Detective Jurney and Deputy Ward applied to the Alexander County Magistrate for a search warrant for Defendant's residence. As part of the warrant application, Deputy Ward submitted an affidavit in which he attached a statement by Detective Jurney detailing the information that the confidential informant had relayed to her. Deputy Ward's affidavit stated that in addition to receiving information from Detective Jurney, he had "received information on several occasions throughout the past year from concerned citizens in the area of the premise to be searched, about drug traffic mainly [m]arijuana at the premise to be searched." Deputy Ward also noted that he had searched Defendant's criminal history and discovered that Defendant was charged with possession of marijuana in December 2012[2] in Alexander County.

An Alexander County Magistrate issued a search warrant for Defendant's residence, which law enforcement officers executed the same day. The search revealed "indoor grow equipment," marijuana, and "plants," which officers seized.

On 24 June 2013, Defendant was indicted for possession with intent to manufacture, sell, and deliver marijuana; manufacturing marijuana; felony possession of a Schedule VI controlled substance; and maintaining a vehicle/dwelling/place for a controlled substance.[3] On

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2. Deputy Ward's affidavit indicates that Defendant was charged with possession of marijuana on 22 December 2013 – nearly a year in the future from the date of the warrant application. However, at the hearing on Defendant's motion to suppress, Deputy Ward testified that this was a clerical error in the application, and that the information he obtained reflected that Defendant had been charged in December 2012. Defendant's counsel acknowledged the charge and the correct date.

3. On 24 June 2013, Defendant was also indicted for driving while impaired; possession with intent to manufacture, sell, and deliver marijuana; simple possession of a Schedule VI controlled substance; and possession of drug paraphernalia. These charges stem from an incident occurring 22 December 2012.

19 November 2013, Defendant filed a motion to suppress evidence discovered as a result of the search of his residence.

Defendant's motion was heard on 9 February 2015 by Judge Joseph N. Crosswhite in Alexander County Superior Court. Deputy Ward and Detective Jurney testified at the hearing. At the conclusion of the hearing, Judge Crosswhite denied Defendant's motion to suppress, and, on 13 March 2015, entered a written order to the same effect.

Two days after the suppression hearing, on 11 February 2015, Defendant pled no contest to one count of driving while impaired and one count of manufacturing marijuana. Defendant was sentenced to 12 months imprisonment for the driving while impaired charge, and 6–17 months imprisonment for the manufacturing marijuana charge; however, both sentences were suspended for 30 months of supervised probation, subject to certain terms and conditions.

II. Petition for Writ of Certiorari

[1] We initially address this Court's jurisdiction over this appeal. On 24 February 2015, Defendant filed a Notice of Appeal stating that he "appeals the Order of the Superior Court denying Defendant's motion to suppress all physical evidence seized by law enforcement officers during the search of [] Defendant's residence on the date of the alleged offense, entered in this action." The Notice of Appeal further specified that "[t]he right to this appeal was specifically reserved as part of Defendant's guilty plea."

This Court has held that:

> [I]n order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment.

State v. Cottrell, 234 N.C. App. 736, 739–40, 760 S.E.2d 274, 277 (2014); *see also* N.C. Gen. Stat. § 15A-979(b) (2015) (providing that the denial of a motion to suppress evidence "may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilt[]").

Here, Defendant gave notice to the State that he intended to appeal the denial of his motion to suppress, and the reservation of the right was noted in the transcript of his no contest plea, which provided:

"Defendant expressly reserves the right to appeal the Court's denial of Defendant's Motion to Suppress, and his plea herein is conditioned upon his right to appeal that decision pursuant to [N.C. Gen. Stat. §] 15A-979(b)." However, Defendant's 24 February 2015 Notice of Appeal failed to indicate that he was appealing from the Judgment Suspending Sentence entered against him as a result of his 11 February 2015 plea of no contest, as is required by N.C. Gen. Stat. § 15A-979(b). Instead, Defendant's Notice of Appeal only indicated that he was appealing from the order denying his motion to suppress.

On 5 September 2015, Defendant filed a petition for writ of certiorari, asking this Court to review the Judgment Suspending Sentence. "Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, __, N.C. App. __, __,780 S.E.2d 863, 866 (2015) (citation omitted). North Carolina Rule of Appellate Procedure 21(a) provides:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21. In *State v. Cottrell*, this Court exercised its discretion and granted the defendant's petition for writ of certiorari, "because it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and because defendant has lost his appeal through no fault of his own. . . ." 234 N.C. App. at 740, 760 S.E.2d at 277. Here, applying the same reasoning as this Court imposed in *Cottrell*, we grant Defendant's petition for writ of certiorari and address Defendant's appeal on the merits.

III. Analysis

[2] Defendant contends that the trial court erred in denying his motion to suppress. We disagree.

Our standard of review on an appeal from an order denying a motion to suppress is "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnson*, 98 N.C. App.

290, 294, 390 S.E.2d 707, 709 (1990) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are reviewed *de novo*. *State v. O'Connor*, 222 N.C. App. 235, 238–39, 730 S.E.2d 248, 251 (2012) (internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (internal quotation marks and citation omitted).

Whether probable cause exists to support issuance of search warrant by a magistrate is reviewed under the "totality of the circumstances" test established by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983), and adopted by the North Carolina Supreme Court in *State v. Arrington*, 311 N.C. 633, 641–43, 319 S.E.2d 254, 259–261 (1984). Under the totality of the circumstances test:

> [th]e task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Arrington, 311 N.C. at 638, 319 S.E.2d at 257–58 (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548). " '[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' " *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis omitted) (quoting *Gates*, 462 U.S. at 243 n. 13, 76 L. Ed. 2d at 552 n. 13).

Here, Defendant contests the following paragraph of the trial court's order denying Defendant's motion to suppress,

> In the present matter, this Court concludes that the search warrant was based on information from a reliable confidential informant who provided information that was both accurate and fresh. The information that was provided included a detailed description of the Defendant, where he lived, directions to his house, where the marijuana was kept, and how it was packaged. This information was verified by both officers from the Iredell County Sheriffs' [sic] Department and the Alexander County Sheriffs' [sic] Department. This Court also concludes that the statements made by the

> confidential informant were against her penile [sic] interest in that she admitted to purchasing and possessing marijuana from the Defendant in the past few days.

Defendant challenges the trial court's findings regarding the information provided by the confidential informant and the verification of that information by law enforcement officers, arguing that it is not supported by competent evidence. Defendant contends that the balance of the challenged paragraph, comprised of conclusions of law, is not supported by the findings of fact.

For the reasons discussed below, we disagree with Defendant's contentions. And although the order denying Defendant's motion to suppress omits a conclusion that the application for the search warrant supported a finding of probable cause, the trial court's findings of fact, other conclusions of law, and ultimate denial of Defendant's motion to suppress necessitate such a conclusion. Accordingly, we analyze the challenged findings and conclusions within the context of the larger issue before this Court—whether the facts and circumstances set forth in the application for the search warrant were sufficient to support a finding of probable cause.

We start by considering the reliability of the information provided in the search warrant application. "[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation omitted). The North Carolina Supreme Court has held that "great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. However, this deference is not unlimited. *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014). "[U]nder the totality of the circumstances test, a reviewing court must determine 'whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.' " *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365 (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). Therefore, "[a] reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'merely ratifying the bare conclusions of affiants.' " *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation omitted).

This Court has held:

> When probable cause is based on an informant's tip a totality of the circumstances test is used to weigh the reliability or unreliability of the informant. Several factors are used

> to assess reliability including: (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police.

State v. Green, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638 (2009) (internal quotation marks and citation omitted). We therefore assess the reliability of the information provided by the confidential informant under the totality of the circumstances test, weighing these reliability factors.

A. Confidential and Reliable Tip Standard

As an initial matter, because the affidavit of Deputy Ward is based in part on information provided to Detective Jurney from an informant unknown to Deputy Ward, "we must determine the reliability of the information by assessing whether the information came from an informant who was merely anonymous or one who could be classified as confidential and reliable." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation omitted). Information from an anonymous source is afforded less weight in the totality of circumstances than information that is confidential and reliable. *See State v. Hughes*, 353 N.C. 200, 205–06, 539 S.E.2d 625, 629 (2000).

In order for a reviewing court to weigh an informant's tip as confidential and reliable, "evidence is needed to show indicia of reliability[.]" *Id.* at 204, 539 S.E.2d at 628. Indicia of reliability may include statements against the informant's penal interests and statements from an informant with a history of providing reliable information. *Benters*, 367 N.C. at 665, 766 S.E.2d at 598. Even if an informant does not provide a statement against his/her penal interest and does not have a history of providing reliable information to law enforcement officers, the Supreme Court has suggested that "other indication[s] of reliability" may suffice. *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628.

"When sufficient indicia of reliability are wanting," a reviewing court uses the anonymous tip standard to evaluate the reliability of information provided by an informant. *Benters*, 367 N.C. App. at 666, 766 S.E.2d at 598 (citation omitted).

> An anonymous tip, standing alone, is rarely sufficient, but the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to pass constitutional muster. Thus, a tip that is somewhat lacking in reliability may still provide a basis for probable

> cause if it is buttressed by sufficient police corroboration. Under this flexible inquiry, when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information.

Id. at 666, 766 S.E.2d at 598–99 (internal quotation marks and citations omitted). The North Carolina Supreme Court has utilized the anonymous tip standard in *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000), and *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014).

In *Hughes*, a "confidential, reliable informant" provided a tip to the captain of the Onslow County Sheriff's Department regarding the defendant's possession of marijuana and cocaine. 353 N.C. at 201–02, 539 S.E.2d at 627. The captain, who received the tip by phone, relayed the information to a detective with the Jacksonville Police Department. *Id.* at 201, 539 S.E.2d at 627. The detective then relayed the information to another detective within the department. *Id.* The two Jacksonville Police Department detectives subsequently conducted an investigatory stop of the defendant and discovered drugs on his person. *Id.* at 202-03, 539 S.E.2d at 628. The North Carolina Supreme Court applied the anonymous tip standard and reversed the defendant's criminal conviction because the informant had not been used to give accurate information in the past and because the captain—the only officer who spoke with the informant—did not convey to the other officers how he knew the informant or why the informant was reliable. *Id.* at 204, 539 S.E.2d at 629. The Supreme Court further noted that the statement of the informant was not against his/her penal interest, and that "[t]he only evidence showing that the identity of this informant was known is [the captain's] conclusory statement that the informant was confidential and reliable." *Id.* at 204, 539 S.E.2d at 627. Accordingly, the Supreme Court applied the anonymous tip standard in assessing the reliability of the informant, holding that "[w]ithout more than the evidence presented, we cannot say there was sufficient indicia of reliability to warrant use of the confidential and reliable informant standard." *Id.* at 205, 539 S.E.2d at 629.

In *Benters*, after receiving a tip from an informant face-to-face, a detective with the Franklin County Sheriff's Office relayed to a lieutenant with the Vance County Sheriff's Office that a residence owned by the defendant in Vance County was being used as "an indoor marijuana growing operation." 367 N.C at 661–62, 766 S.E.2d at 596. The lieutenant who received this third-hand information then applied for a search warrant, in which he described the informant as a "confidential and reliable source of information." *Id.* at 662, 766 S.E.2d at 596. After noting that the information provided by the informant did not contain a statement

against his/her penal interest and also noting that the informant did not have a track record, the Supreme Court assessed whether the face-to-face meeting between the informant and the detective who initially received the tip provided additional indicia of reliability. *Id.* at 665–67, 766 S.E.2d at 598–99. Although that detective received the tip through a face-to-face meeting with the informant, as opposed to by phone as in *Hughes*, the Supreme Court still applied the anonymous tip standard, holding that the affiant officer had nothing more than another officer's " 'conclusory statement that the informant was confidential and reliable[.]' " *Id.* at 668, 766 S.E.2d at 600 (quoting *Hughes*, 353 N.C. at 204, 539 S.E.2d at 629). The Supreme Court explained further why the anonymous tip standard applied:

> [T]he affidavit here fails to establish the basis for [the Franklin County detective's] appraisal of his source's reliability, including the source's demeanor or degree of potential accountability. The affidavit does not disclose whether [the Franklin County detective] met his source privately, or publicly and in uniform such that the source could risk reprisal. Moreover, nothing in the affidavit suggests the basis of the source's knowledge.

Id. at 668–69, 766 S.E.2d at 600.

Turning to the case before us, in determining which standard applies to the confidential informant's tip, we note that the informant did not have a history of providing reliable information in the past. The trial court found in pertinent part:

> Detective Ward indicated that he had never met with the confidential informant and was relying upon her trustworthiness from Detective Sergeant Jurney. Detective Sergeant Jurney indicated that she had never worked with the confidential informant before, but the information she provided was detailed and accurate as to a description of the Defendant, where the marijuana was located, and where the Defendant lived.

The confidential informant's lack of a "track record" however, does not require this Court to consider the tip anonymous. "What is popularly termed a 'track record' is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause." *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433. Instead, in determining whether to apply the anonymous tip standard or the confidential and reliable tip standard, we assess whether the

information provided by the informant includes a statement against her penal interest and other indicia of her reliability.

"Whether a statement is in fact against interest must be determined from the circumstances of each case." *Williamson v. United States*, 512 U.S. 594, 601, 129 L. Ed. 2d 476, 484 (1994). Here, in the order denying Defendant's motion to suppress, the trial court concluded that "the statements made by the confidential informant were against her penile [sic] interest in that she admitted to purchasing and possessing marijuana from the Defendant in the past few days." This conclusion is supported by the following findings of the trial court that: "two days prior [to her discussion with Detective Jurney], the confidential informant had been to the home of Adam Robert Jackson and purchased marijuana[;] . . . "the confidential informant had purchased marijuana from inside the home[;] and [] the confidential informant had bought marijuana on several prior occasions from the Defendant at the same residence." These findings are supported by the search warrant application and the officers' testimony at the suppression hearing.

"Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search." *Beam*, 325 N.C. at 221, 381 S.E.2d at 330. This Court and the Supreme Court have categorized an informant's statement implicating that the informant had used and/or purchased marijuana in the past as a statement against the informant's penal interest, for the purpose of weighing reliability. *See*, *e.g.*, *State v. Witherspoon*, 110 N.C. App. 413, 418, 429 S.E.2d 783, 786–87 (1993) (categorizing an informant's statement as one against his penal interest where the informant told an officer that he had used marijuana, "thus admitting [the informant's] possession and use of a controlled substance in the past"); *Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (holding that "[t]he information supplied by the first informant establishes, against the informant's penal interest, that he had purchased marijuana from the defendant[]").

Defendant contends that the confidential informant's statement was not against her penal interest because it "was motivated by a desire to curry favor with the authorities to help her avoid conviction on her own charges." In *Arrington*, the North Carolina Supreme Court refuted this argument:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the

> form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

311 N.C. at 641, 319 S.E.2d at 259 (quoting *United States v. Harris*, 403 U.S. 573, 583–84, 29 L. Ed. 2d 723, 734 (1971)).

Here, the record evidence does not indicate that the confidential informant claimed that she was unaware that the substance that she possessed was marijuana. To the contrary, the statement of Detective Jurney, included in the search warrant application, provides that "[t]he confidential informant told Det. Sgt. Jurney that he/she, along with other individuals, had purchased marijuana from [Defendant] numerous times at that residence." Even if the confidential informant had been motivated to provide this information by a desire to curry favor with Detective Jurney and potentially help her avoid conviction, she still would have incurred the "residual risk" of having admitted purchasing, and in turn, possessing marijuana. Accordingly, we hold that the information provided was against the confidential informant's penal interest.

Noting that the confidential informant did not have a track record of providing reliable information, but did make statements against her penal interest, we consider other indicia of the confidential informant's credibility and reliability, including the face-to-face nature of the officer's encounter with her and the confidential informant's first-hand knowledge of the information.

The information that Detective Jurney relayed to Deputy Ward regarding the Defendant's criminal conduct was first ascertained during a face-to-face encounter between Detective Jurney and the confidential informant. " 'The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties.' " *Witherspoon*, 110 N.C. App. at 418, 429 S.E.2d at 785–86 (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971)). Here, Deputy Ward's affidavit did not merely rely on the information relayed by Detective Jurney. Instead, Detective Jurney accompanied Deputy Ward to apply for the search warrant and provided a written statement as part of the warrant application. The face-to-face nature of Detective Jurney's encounter with the confidential informant, outlined in her written statement, distinguishes this case from *Hughes* and *Benters*. Here, Detective Jurney had the opportunity to assess the

informant's demeanor during their initial encounter and during their drive to confirm Defendant's address. Additionally, the nature of this face-to-face conversation between Detective Jurney and the informant "significantly increased the likelihood that [the informant] would be held accountable if her tip proved to be false." *State v. Allison*, 148 N.C. App. 702, 705, 559 S.E.2d 828, 830 (2002).

The confidential informant had first-hand knowledge of the facts she provided. Detective Jurney's written statement detailed the manner in which the confidential informant came to observe the information that she then relayed, specifically acknowledging that the informant had purchased marijuana from Defendant's residence just two days prior. The informant provided detailed information, including that during this most recent purchase of marijuana, Defendant went into a bedroom located on the right side of his house, turned a key in a lock, and returned with a mason jar containing marijuana. By contrast, the applications for the search warrants at issue in *Hughes* and *Benters* failed to explain how the informants in those cases had become aware of the defendants' criminal activity. In addition to Deputy Jurney's detailed statement, Deputy Ward's affidavit explained specific circumstances underlying the search warrant application sufficient for an assessment of the confidential informant's reliability.

For the aforementioned reasons, we evaluate the reliability of the information provided by the informant under the confidential and reliable standard.

B. Police Corroboration

Another factor in assessing the reliability or unreliability of an informant is "whether information provided by the informant could be and was independently corroborated by the police." *Green*, 194 N.C. App. at 627, 670 S.E.2d at 638. As explained *supra*, information provided by the informant in this case is more reliable than a tip from an anonymous source. "On the fluid balance prescribed by the Supreme Court, a less specific or less reliable tip requires greater corroboration to establish probable cause." *Benters*, 367 N.C. at 669–70, 766 S.E.2d at 601 (citation omitted).

Both Detective Jurney and Deputy Ward corroborated the confidential informant's tip in various respects. Detective Jurney searched the CJ LEADS database for "Adam Jackson" and found a person named Adam Robert Jackson with the listed address of 2099 Old Mountain Road—the name and location provided by the informant. Detective

Jurney's database search also corroborated the informant's description of Defendant's appearance and age.

In addition to providing an address and general description of the neighborhood of Defendant's residence, the informant accompanied Detective Jurney to a mailbox marker that read 2099 Old Mountain Road, and explained that Defendant's residence was down a private driveway, located on the left side of a fork. After Detective Jurney relayed this information to the Alexander County Sheriff's Office, Captain Clarence Harris drove to the address and ventured down the private driveway, where he confirmed the exact location of Defendant's residence consistent with the confidential informant's description.

Deputy Ward, after receiving the aforementioned information from Detective Jurney, conducted a criminal record search and discovered that "Adam Robert Jackson" had been charged with possession of marijuana just over a month earlier, on 22 December 2012. Deputy Ward also noted that he had "received information on several occasions throughout the past year from concerned citizens in the area of the premise to be searched, about drug traffic mainly [m]arijuana at the premise to be searched."

Defendant challenges the trial court's finding that law enforcement officers verified information regarding where the marijuana was kept and how it was packaged. We agree that this finding does not corroborate the reliability of the information because the officers did not locate the marijuana before applying for the search warrant. In order to carry weight as corroborating evidence for the purpose of determining the reliability of a tip, information must have been presented to the magistrate who issued the search warrant. *See* N.C. Gen. Stat. § 15A-245 (2015) (providing that "information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official[]"); *see also Benters*, 367 N.C. at 673, 766 S.E.2d at 603; *Hughes*, 353 N.C. at 208–09, 539 S.E.2d at 631–32; *State v. Brown*, 199 N.C. App. 253, 258–59, 681 S.E.2d 460, 464–65 (2009); *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 23 (2001); *State v. Earhart*, 134 N.C. App. 130, 133–34, 516 S.E.2d 883, 886 (1999). However, we hold that the trial court's other findings regarding the officers' verification of Defendant's physical appearance, address, and specific directions to Defendant's residence are supported by competent evidence and are sufficient to support the trial court's conclusion that probable cause was established.

C. Freshness of Tip

We also consider the freshness of the confidential informant's information. The informant provided Deputy Ward with detailed information regarding her purchase of marijuana from Defendant just two days prior. The informant relayed specific details, including witnessing Defendant go into a bedroom located on the right side of his residence, hearing the sound of a key turning in a lock, and observing Defendant return to the room where she was waiting with a mason jar filled with marijuana. In the order denying Defendant's motion to suppress, the trial court made findings of fact encompassing all of this information.

The passage of two days between an informant's observation of criminal activity and an issuance of a search warrant bolsters the reliability of a tip. *See State v. Singleton*, 33 N.C. App. 390, 392, 235 S.E.2d 77, 79 (1977) (holding that because the affidavit "narrowed down the informant's observation to within 48 hours of the time the warrant was obtained[,] . . . the magistrate, acting upon this information, could reasonably conclude that there was probable cause to believe that the drugs were still in defendant's possession[]"). Accordingly, we hold that the timely nature of the informant's tip provides additional indicia of reliability.

For these same reasons, we hold that the conclusion of law challenged by Defendant that "the search warrant was based on information from a reliable confidential informant who provided information that was both accurate and fresh[,]" is supported by the trial court's findings of fact, which, in turn, are supported by competent evidence.

IV. Conclusion

In assessing the reliability of the information provided by the informant under the confidential and reliable tip standard, we consider that the information was obtained first-hand, that it was against the informant's penal interest, and that it was timely and not stale. Additionally, we hold that Detective Jurney and Deputy Ward's corroboration of this information was adequate to support a finding of probable cause. Accordingly, under the totality of the circumstances test, we hold that the application for the search warrant was sufficient to support the magistrate's finding of probable cause.

AFFIRMED.

Judge STEPHENS concurs.

Judge HUNTER, JR. concurs in part, dissents in part, by separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part, dissenting in part.

As an initial matter, I join the majority in granting Defendant's petition for writ of *certiorari*. However, I respectfully dissent from the majority in favor of reversing the trial court.

Reviewing the totality of the circumstances, and all of the record evidence, no probable cause existed for a warrant to issue in this case. *See State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). To uphold my "duty to ensure that a magistrate does not abdicate his or her duty by 'merely ratifying the bare conclusions of affiants,' " I detail the following record evidence of the events leading up to Deputy Ward's search warrant application. *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (internal quotation marks and citation omitted).

As the majority states, Detective Jurney spoke with the confidential informant, whom she had never met before, during a knock-and-talk on 30 January 2013. Detective Jurney performed this knock-and-talk with another Iredell County narcotics detective in connection with an unrelated criminal case. No charges were ever filed against the confidential informant, though she admitted to previously purchasing some quantity of marijuana from Defendant on a prior occasion.

The next day, on 31 January 2013, the confidential informant directed officers to Defendant's residence. She identified Defendant's home and discussed the details of her previous marijuana purchase. She described Defendant's physical appearance and age. Officers confirmed Defendant's residency and past appearance using CJ LEADS.

Thereafter, Deputy Jurney relayed the information to Deputy Kelly Ward of the Alexander County Sheriff's Office because Defendant's residence is located in Deputy Ward's jurisdiction. Deputy Ward attached Deputy Jurney's affidavit to a search warrant application to search Defendant's home.

At the suppression hearing, Detective Jurney testified she did not remember saying "[to the confidential informant] that if [she] did not cooperate . . . that [her] daughter would be removed from her custody." Detective Jurney testified the confidential informant stated she

bought marijuana from Defendant after officers "indicated . . . [that] the confidential informant [ ] was facing criminal charges herself."

According to Detective Jurney, "high school kids" contacted her "out of the blue" "on several occasions throughout [January 2012 through January 2013]." The students voiced concern about their friend who "[bought] drugs and us[ed] cocaine" from Defendant. The record discloses no information about these individuals, the number of times they contacted Detective Jurney, or the circumstances surrounding their conversations with Detective Jurney.

Prior to the search, officers knew Defendant matched the confidential informant's description of him, based upon his past photo in the CJ LEADS system. Officers also knew Defendant lived at the home the confidential informant identified because of his listed residence on CJ LEADS. They also knew Defendant was charged with possession of marijuana two months prior in December 2012. Apart from this, the officers did not corroborate the confidential informant's information about Defendant's marijuana business.

This Court, and our Supreme Court, have upheld searches of suspected drug traffickers' residences because "officers [ ] discovered some specific and material connection between drug activity and the place to be searched." *State v. Allman*, ___ N.C. App. ___, ___, 781 S.E.2d 311, 317 (2016). Examples of this include: pulling a suspect's trash that is placed at the curb and uncovering several marijuana plants, *Sinapi*, 359 N.C. at 395, 610 S.E.2d at 363; performing controlled drug buys at the suspect's residence using confidential sources, *State v. Riggs*, 328 N.C. 213, 215–16, 400 S.E.2d 429, 431 (1991); and staking out the suspect's residence and observing a high volume traffic pattern "with visitors only staying [inside] for about one minute" and observing several persons being arrested during that time period for drug possession "as they exited the suspect residence," *State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 501 (1991).

The verb "corroborate" means, "To strengthen or confirm; to make more certain." *Black's Law Dictionary* (10th ed. 2014). A witness's testimony is said to be corroborated when "it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established." *Black's Law Dictionary* 344 (6th ed. 1990). Here, the officers did not corroborate the confidential informant's information. The officers corroborated Defendant's appearance, history of marijuana possession, residence, and the confidential informant's ability to navigate to the residence. The officers did not perform

any controlled drug buys, observe a large number of visitors that is consistent with an ongoing marijuana operation, pull Defendant's trash to find marijuana or marijuana plants, or review Defendant's electricity and water consumption to corroborate any suspicion of marijuana manufacturing. Rather, the officers applied for a search warrant using a previously unknown informant's statements regarding her past behavior, which were made after the officers told her she was facing criminal charges, and were possibly made after officers threatened to take her daughter from her.

For the Fourth Amendment to have any effect, officers should corroborate the information given to them in circumstances like these. The confidential informant's information and the information in Deputy Jurney's affidavit, taken in light of the totality of the circumstances, do not provide a substantial basis for concluding that probable cause exists. *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365 (quoting *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989)). Accordingly, I must respectfully dissent.

STATE OF NORTH CAROLINA,
v.
WESLEY PATTERSON

No. COA15-1145

Filed 4 October 2016

Appeal and Error—challenged testimony—waiver

On appeal from defendant's convictions resulting from the theft of a laptop computer and an iPad, the Court of Appeals held that defendant had waived review of his challenges to certain testimony by a police detective regarding what she observed in surveillance footage. Even assuming error, there was no prejudice because other evidence showed that defendant was present in the office building and was seen with the computer bag in his possession.

Appeal by defendant from judgments entered 19 March 2014 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Alesia Balshakova, for the State.

Glover & Peterson, P.A., by Ann B. Petersen, for defendant-appellant.

McCULLOUGH, Judge.

Wesley Patterson ("defendant") appeals from judgments entered upon his convictions for breaking and entering, habitual larceny, and for attaining habitual felon status. For the following reasons, we find no error.

I. Background

On 27 January 2014, a Mecklenburg County Grand Jury indicted defendant in file number 14 CRS 201911 on one count of felonious larceny for stealing a laptop computer and iPad valued in excess of $1,000.00. Additional indictments returned on 31 March 2014 charged defendant for attaining habitual felon status in file number 14 CRS 12560 and for habitual larceny in file number 14 CRS 12561. Superseding indictments adding one count of felonious breaking and entering and one count of felonious possession of stolen goods in file number 14 CRS 201911 were later returned on 4 August 2014 and 8 December 2014. In total, defendant was indicted for felonious larceny, felonious breaking and entering, felonious possession of stolen goods, habitual felon status, and habitual larceny.[1]

Pretrial matters, including how the court should proceed with the habitual larceny charge, were addressed on 16 and 17 March 2015. Those pretrial matters included the State's motion to join defendant's charges for trial and defendant's motion to dismiss on the ground that the crime of habitual misdemeanor larceny subjects defendant to double jeopardy. The State's motion to join was allowed and defendant's motion to dismiss was denied. The case then proceeded to trial before the Honorable Robert T. Sumner in Mecklenburg County Superior Court on 17 March 2015.

During a break in jury selection, and prior to the jury being empaneled, defendant admitted to the prior misdemeanor larceny convictions needed to establish habitual larceny in order to keep evidence of the prior larcenies from being presented at trial.

The State's evidence at trial tended to show the following: On 14 January 2014, a man entered the offices of First Financial Services, Inc. ("First Financial"), in the Fairview One Center on Fairview Road in Charlotte (the "office building"). Brian Gillespie, a loan officer employed

1. Habitual larceny raises a misdemeanor larceny to a felony if the accused has four prior misdemeanor larcenies. *See* N.C. Gen. Stat. § 14-7 (2015).

by First Financial, observed the man, whom he had never seen before, coming out of his boss' office. Gillespie and the man made eye contact as the man surveyed the office, but they did not speak because Gillespie was on the phone with a customer. The man then left. Gillespie described the man as tall, slender, African-American, and wearing a newsboy cap with a button in the front.

Approximately thirty minutes later, David Hay, Gillespie's boss, returned to his office from a meeting. Gillespie then went to Hay's office to inquire who the man was. Hay was unaware anyone had been in his office and, at that time, noticed his computer bag containing his MacBook Air laptop and iPad was missing. Hay began searching the office building and parking garage for anyone matching the description provided by Gillespie before realizing that he could track his iPad through an application on his cell phone. Hay then used his phone to track his iPad moving on Old Pineville Road. Hay and his coworker, Neil Nichols, then drove to a strip mall across the road from the Woodlawn light rail station where the tracking application indicated the iPad was. As Hay and Nichols turned into the parking lot, Hay saw the man walking with the computer bag over his shoulder. At trial, Hay identified the man as defendant.

As defendant headed across the street towards the light rail station, Nichols called 911 while Hay flagged down a nearby police officer. That officer, Ricardo Coronel, then approached defendant, who was sitting on a bench at the Woodlawn light rail station with the computer bag next to him. Officer Coronel first asked defendant if the computer bag was his, but defendant did not respond. Officer Coronel then asked for defendant's identification. After verifying defendant's identification and that the computer bag belonged to Hay, Officer Coronel arrested defendant.

Gillespie was then summoned to the Woodlawn light rail station to identify defendant. Upon the arrival of Gillespie, the police conducted a "show-up" identification, during which Gillespie positively identified defendant as the man he had seen exiting Hay's office.

Defendant was then taken to the Wilkinson Boulevard Police Station, where he was interviewed by Officer James Crosby and Detective Tammy Post. A redacted version of the videotaped interview was published to the jury at trial. The State also published surveillance video footage from the interior of the light rail train and of the Woodlawn light rail platform. Defendant initially objected that the video lacked foundation, but after a *voir dire* examination of the light rail employee and lengthy bench conference, the objection was overruled. Ray Alan Thompson, a safety

coordinator for the Charlotte Area Transit, played the surveillance footage for the jury. Neither the State nor the Defense commented on the video.

The State then played the surveillance footage for a second time during the testimony of Detective Post. During the playing of the surveillance footage, the State asked Detective Post to indicate when she recognized someone. Without objection, Detective Post identified defendant in the surveillance footage from inside the train. When Detective Post further testified that defendant was carrying the computer bag, defendant offered a general objection that was overruled. Detective Post then continued to testify that she could tell it was defendant in the video because she was familiar with defendant and because defendant is very tall. When the State asked Detective Post if "[defendant was] wearing the same clothing [that] he was wearing when [she later] interviewed him[,]" defendant's objection on the basis of "leading" was sustained. Detective Post then continued to testify as surveillance footage of the train and platform recorded by various cameras at different angles was shown. Detective Post repeatedly identified defendant and indicated defendant was holding the computer bag in the surveillance footage. Detective Post also testified that defendant was wearing the same clothes in surveillance footage that he wore when she observed him in the back of a police car and when she interviewed him.

The following day, the State also introduced into evidence a still image showing a person exiting the office building on the day the computer bag was taken. When Detective Post was asked who the individual in the photograph was, the defense objected and the objection was overruled. Detective Post then identified defendant in the photograph. The State followed up on the identification by asking Detective Post if anything was peculiar about defendant in the picture. Again, defendant objected and the objection was overruled. Detective Post then responded that a rectangular object, consistent with the shape of the computer bag, appeared to be tucked under defendant's shirt. After this testimony, both the State and defendant rested.

On 19 March 2015, the jury returned verdicts finding defendant guilty of felonious larceny pursuant to unlawful entering, felonious entering, and felonious possession of stolen goods or property pursuant to unlawful entering. Defendant then pled guilty to attaining habitual felon status as part of a plea arrangement whereby the State agreed to consolidate defendant's convictions into a single judgment for sentencing. Upon defendant's convictions and the plea arrangement, the trial judge consolidated the breaking and entering, habitual larceny, and

habitual felon offenses and entered a single judgment sentencing defendant to a term of 110 to 144 months. The trial judge arrested judgment on the felony larceny and possession of stolen goods or property offenses. Defendant gave notice of appeal.

II. Discussion

Defendant asserts that this case turned on whether the evidence was sufficient to convince the jury that he was the person seen in the office building and that the State's evidence placing him in the office building was the weakest part of the State's case. Thus, defendant claims the State elicited identification testimony from Detective Post to bolster its case.

The sole issue on appeal is whether the trial court erred in allowing portions of Detective Post's testimony into the evidence at trial. Specifically, defendant contends the trial court erred in allowing Detective Post to (1) identify defendant in light rail surveillance footage, (2) testify that defendant could be seen holding David Hay's computer bag in the surveillance footage, and (3) identify defendant in the still image from the office building. Defendant contends that the challenged testimony of Detective Post was inadmissible and prejudicial lay witness opinion testimony because "Detective Post was in no better position than the jury to evaluate the evidence[.]"

The N.C. Rules of Evidence provide that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2015). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). But, lay opinion testimony identifying a person in a photograph or videotape may be allowed " 'where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.' " *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (quoting *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354-55 (2009), *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009)), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). In *Belk*, this Court identified the following factors as relevant in the above analysis:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

Id. Applying these factors in *Belk*, this Court held that the trial court erred by admitting an officer's lay opinion testimony identifying the defendant as the person depicted in surveillance video footage "[b]ecause [the o]fficer . . . was in no better position than the jury to identify [the d]efendant as the person in the surveillance video[.]" *Id.* at 414, 689 S.E.2d at 441. This Court further found the error to be prejudicial and remanded for a new trial. *Id.*

When a trial court's ruling on the admissibility of lay witness opinion testimony is properly preserved for appellate review, we review for an abuse of discretion. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (quotation marks and citation omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005). Thus, as this Court recognized in *Belk*, "we must uphold the admission of [an officer's] lay opinion testimony if there was a rational basis for concluding that [the officer] was more likely than the jury [to correctly] identify [the d]efendant as the individual in the surveillance footage." *Belk*, 201 N.C. App. at 417, 689 S.E.2d at 442.

Yet, as an initial matter, we must decide whether defendant preserved these issues for appeal. The State contends defendant did not.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996). "Where evidence is admitted without objection, the benefit of a

prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985). Similarly, "[a] defendant waives any possible objection to testimony by failing to object to [the] testimony when it is first admitted." *State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000).

As indicated above, all the challenged testimony in the present case was elicited by the State during the testimony of Detective Post. Upon review of the transcript, it is clear that defendant waived review of his challenges to Detective Post's testimony regarding what she observed in the surveillance footage from the light rail train and light rail platform. First, there was never an objection to Detective Post's repeated identifications of defendant in the surveillance footage. Second, although defendant did object the first time Detective Post testified that defendant was carrying the computer bag in the surveillance footage, that objection was general and the same testimony was later admitted without objection. Concerning Detective Post's testimony based on the still image from the office building, we find the preservation issue to be a closer call because defendant objected to both questions about the photograph. However, those objections were general and "the evidence, considered as a whole, [is not] clear that there is no purpose to be served from admitting the evidence." *Jones*, 342 N.C. at 535, 467 S.E.2d at 20.

Nevertheless, because the preservation of the issues concerning Detective Post's identification of defendant in the still image is a close call, we feel compelled to note that even if defendant had properly preserved the issues for appellate review and the testimony was determined to be admitted in error, defendant is entitled to a new trial only if he was prejudiced by the error.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . .

N.C. Gen. Stat. § 15A-1443(a) (2015). Upon review of the evidence in this case, we hold defendant was not prejudiced by any error in allowing Detective Post's testimony. Unlike in *Belk*, where the State's case rested exclusively on the surveillance video and the officer's identification testimony from the video, 201 N.C. App. at 418, 689 S.E.2d at 443, the

State in the present case presented sufficient evidence besides Detective Post's testimony to allow the jury to determine defendant was at the office building and to identify defendant as the perpetrator.

First, the jury was afforded the opportunity to view the surveillance footage and the still image. As defendant notes in his argument that Detective Post was in no better position to identify defendant than the jury, the jury could compare defendant's appearance in the surveillance footage and the still image to the appearance of defendant in the videotaped interview conducted immediately after defendant's arrest. Second, the State presented other evidence tending to place defendant in the office building, including an identification of defendant by Gillespie. Specifically, Gillespie testified that he observed a man exit Hay's office and later identified that man as defendant. Defendant acknowledges Gillespie's testimony, but contends that the testimony by itself could be considered skeptically; and further asserts the suggestive nature of "show-up" identifications increases the potential for unreliability.

Defendant is correct that courts have criticized the use of show-up identifications because the practice of showing suspects singly to persons for the purpose of identification may be inherently suggestive. *State v. Oliver*, 302 N.C. 28, 44-45, 274 S.E.2d 183, 194 (1981). Yet, show-up identifications "are not *per se* violative of a defendant's due process rights." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citing *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140 (1977)). "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.* We have explained as follows:

> Our courts apply a two-step process for determining whether an identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.

State v. Rawls, 207 N.C. App. 415, 423, 700 S.E.2d 112, 118 (2010) (internal quotation marks and citations omitted). When determining if there is a substantial likelihood of irreparable misidentification,

> courts apply a totality of the circumstances test. For both in-court and out-of-court identifications, there are five factors to consider in determining whether an identification procedure is so inherently unreliable that the evidence must be excluded from trial: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 424, 700 S.E.2d at 118-19 (internal quotation marks and citations omitted).

In this case, Gillespie was summoned to the light rail station to identify someone detained as a suspect. That person, defendant, was then brought before Gillespie from the back of a police car for identification. This process was unduly suggestive. We, however, do not conclude that there was a substantial likelihood of irreparable misidentification in this case where Gillespie observed defendant exit Hay's office, observed defendant for several minutes and even made eye contact with defendant, was able to give a good description of defendant, did not second guess his identification, and the identification occurred within hours after he had observed him in the office building. Thus, we are not persuaded that Gillespie's testimony was insufficient to allow the jury to find that defendant was seen exiting Hay's office. Moreover, the evidence shows that Hay immediately noticed a man with his computer bag when he arrived at the strip mall while tracking his iPad and later identified that man as defendant. The evidence also shows that defendant was sitting on a bench with the computer bag containing Hay's laptop and iPad when he was approached and detained by police.

In light of the evidence presented at trial showing that defendant was present at the office building and was seen with the computer bag in his possession, even if Detective Post's testimony was admitted in error, defendant was not prejudiced because there is not a reasonable possibility that a different result would have been reached at trial.

III. Conclusion

For the reasons discussed above, we hold defendant failed to preserve the issues for appeal by proper objections at trial; but, in any event,

any error by the trial court in admitting the testimony of Detective Post was not prejudicial given the other identification evidence presented at trial.

NO ERROR.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
HAROLD LEE PLESS, JR., DEFENDANT

No. COA16-461

Filed 4 October 2016

1. Appeal and Error—guilty plea—sentence governed by N.C.G.S. § 90-95—no statutory right of appeal

Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, the Court of Appeals granted the State's motion to dismiss defendant's appeal. Pursuant to N.C.G.S. § 15A-1444(a2), because defendant's sentence was governed by N.C.G.S. § 90-95 rather than § 15A-1340.17 or § 15A-1340.23, he had no statutory right of appeal.

2. Appeal and Error—guilty plea—no statutory right of appeal for sentence—petition for writ of certiorari granted

Where defendant entered into a guilty plea for several drug offenses, was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed the offenses, and had no statutory right of appeal, the Court of Appeals granted defendant's petition for writ of certiorari to reach the merit of his appeal.

3. Sentencing—sentence not authorized under statute—judgment vacated and plea agreement set aside

Where defendant entered into a guilty plea for several drug offenses and was sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he

committed the offenses, the Court of Appeals vacated the judgment entered against defendant and set aside the plea agreement.

Appeal by defendant from judgment entered 16 November 2015 by Senior Resident Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kristin J. Uicker, for the State.

Joseph P. Lattimore for defendant-appellant.

ZACHARY, Judge.

Harold Lee Pless, Jr. (defendant) appeals from judgment entered upon his pleas of guilty to sale of heroin, trafficking in opium, possession of oxycodone with intent to sell or deliver, and driving while impaired. On appeal, defendant argues that the terms of the plea bargain required him to be sentenced to a term that was not authorized under the statutory provisions applicable to the date on which he committed these offenses. We agree.

I. Factual and Procedural Background

On 10 December 2012, the Iredell County Grand Jury indicted defendant for possession with intent to manufacture, sell, or deliver heroin; sale or delivery of heroin; trafficking by possession and by transportation of twenty-eight grams or more of opium; possession with intent to manufacture, sell, or deliver oxycodone; sale or delivery of oxycodone; and driving while impaired. The indictments alleged that defendant had committed the charged offenses in September and October of 2012.

On 9 December 2013, defendant pleaded guilty to selling heroin; trafficking by transportation of more than fourteen but less than twenty-eight grams of opium; possession with intent to manufacture, sell, or deliver oxycodone; and driving while impaired. The State dismissed other charges that were pending against defendant and agreed that defendant would serve a single consolidated sentence of 90 to 120 months for drug trafficking. Sentencing was continued until 21 January 2014. Defendant failed to appear in court on 21 January 2014 and a warrant was issued for his arrest. Defendant was later arrested, and appeared in court for sentencing on 16 November 2015. The trial court entered judgment in accordance with the plea arrangement. The court sentenced defendant to a term of 60 days imprisonment for driving while impaired

and consolidated the drug convictions into one judgment, imposing a sentence of 90 to 120 months, to run consecutively to the DWI sentence. Defendant gave notice of appeal in open court after sentencing.

II. Statutory Right to Appeal

[1] Defendant's sole argument on appeal is that the trial court erred by imposing a sentence of 90 - 120 months imprisonment. Defendant contends, and the State concedes, that for drug trafficking offenses committed in September or October of 2012, N.C. Gen. Stat. § 90-95(h)(4)b. required that defendant receive a mandatory minimum sentence of 90 - 117 months. On 13 July 2016, the State filed a motion for dismissal of defendant's appeal, on the grounds that a challenge to the sentence imposed under § 90-95 is not among the permissible statutory bases pursuant to which a defendant may appeal following entry of a guilty plea. The State is correct in its analysis of this issue.

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (citations omitted). A criminal defendant's right to appeal from judgment entered upon a plea of guilty is governed by N.C. Gen. Stat. § 15A-1444 (2015), which provides in relevant part that:

> (a2) A defendant who has entered a plea of guilty . . . to a felony . . . is entitled to appeal as a matter of right the issue of whether the sentence imposed: . . . (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

The State argues that N.C. Gen. Stat. § 15A-1444(a2) only allows a defendant to appeal a sentence whose term was "not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23," and that, because defendant's sentence was governed by N.C. Gen. Stat. § 90-95, rather than § 15A-1340.17 or § 15A-1340.23, he has no statutory right of appeal. The State is correct that the statute does not include as a basis for appeal of a sentencing issue, that the sentence was "not authorized by N.C. Gen. Stat. § 90-95." Accordingly, we grant the State's motion to dismiss defendant's appeal.

III. Defendant's Petition for Writ of Certiorari

[2] On 27 July 2016, defendant filed a petition for issuance of a writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) provides that a defendant who "is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . may petition the appellate division for review

by writ of certiorari. . . . " In this case, we elect to grant defendant's petition in order to reach the merits of his appeal.

IV. Discussion

[3] Defendant was sentenced pursuant to N.C. Gen. Stat. § 90-95(h)(4)b., which currently provides that:

> (h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article. . . .
>
> (4) Any person who sells . . . transports, or possesses four grams or more of opium or opiate . . . shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved: . . .
>
> b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison and shall be fined not less than one hundred thousand dollars ($ 100,000)[.]

This statute formerly mandated a sentence of 90 - 117 months. However, N.C. Gen. Stat. § 90-95(h)(4)b. was rewritten effective 1 December 2012, and was made applicable to offenses committed after that date. 2012 N.C. Sess. Laws 188, § 5. Because defendant committed the charged offenses in September and October of 2012, he should have been sentenced to 90 - 117 months. The State agrees that the mandatory term applicable on the date upon which defendant committed these offenses was 90 - 117 months.

Defendant has asked this Court to vacate his sentence and return him to "the same position he was in prior to entering" a plea. The State "agrees with Defendant that his entire guilty plea should be vacated[,]" citing *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). In *Rico*, this Court determined that the trial court had entered an improper sentence pursuant to defendant's plea of guilty and remanded for resentencing. Judge Steelman dissented in part on the grounds that because the defendant "had elected to repudiate a portion" of the plea arrangement, the entire plea agreement should be vacated. *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting). Our Supreme Court reversed "for the reasons stated in the dissenting

opinion[.]" Accordingly, we agree that the judgments entered against defendant should be vacated.

For the reasons discussed above, we grant the State's motion to dismiss defendant's appeal; grant defendant's petition for a writ of certiorari; vacate the judgment entered against defendant pursuant to the plea agreement; and set aside the plea agreement.

VACATED.

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
RODNEY JOHNATHAN ROSS, DEFENDANT

No. COA16-254

Filed 4 October 2016

1. Evidence—authenticity of surveillance video—store manager testimony

The trial court did not commit plain error by concluding that a store manager's testimony was sufficient to authenticate a surveillance video.

2. Burglary and Unlawful Breaking or Entering—felonious safecracking—safe combination

Defendant's conviction for felonious safecracking was vacated and remanded to the trial court for resentencing and further proceedings. The State offered no evidence that defendant "fraudulently obtained" the safe combination.

Appeal by Defendant from judgment entered 16 October 2015 by Judge Ola M. Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brian D. Rabinovitz, for the State.

Winifred H. Dillon for the Defendant.

DILLON, Judge.

Rodney Johnathan Ross ("Defendant") appeals from jury verdicts finding him guilty of several felonies including safecracking in conjunction with a breaking and entering that occurred at a fast-food restaurant in Fayetteville. For the foregoing reasons, we vacate the conviction for safecracking; we find no error with respect to the other convictions; and we remand the matter for further proceedings not inconsistent with this opinion.

I. Background

At trial, the State's evidence tended to show as follows:

On the morning of 20 August 2014, an employee arrived at the restaurant and noticed that an air conditioning unit had been removed from the rear of the building, leaving a hole in the wall. The store's surveillance system captured a video of the break-in which showed a individual pulling out the air conditioning unit and entering the restaurant. The intruder attempted to access the safe using paper that appeared to have a safe code on it. After repeatedly attempting to open the safe, the intruder returned to the opening in the rear wall of the building and appeared to converse with someone outside. The intruder then took several boxes of hamburger meat from a cooler and exited the premises.

At least two employees and the store owner testified that they believed the intruder in the video to be Defendant. The State also presented evidence that Defendant's girlfriend ("Ms. Jackson") had been employed at the restaurant as a manager; that as a manager, Ms. Jackson had access to the restaurant's safe combination; that Ms. Jackson was fired from her position as manager approximately two days before the break-in; and that coordinates from Ms. Jackson's GPS tracking bracelet (worn as a condition of her probation for an unrelated incident) showed that she was in the vicinity of the restaurant in the early morning hours when the break-in occurred.

Based on this and other evidence presented by the State, a jury found Defendant guilty of a number of felonies, including safecracking. Following the jury's verdicts, Defendant pleaded guilty to the offense of attaining habitual felon status. The trial court consolidated the charges for judgment and sentenced Defendant to an active prison term.

Defendant timely appealed; however, his notice of appeal failed to designate the court to which his appeal was being taken as required by Rule 4 of the North Carolina Rules of Appellate Procedure. Defendant

has filed a petition for a writ of *certiorari* requesting review of the judgment of the trial court. In our discretion, we allow the petition and consider the merits of Defendant's appeal.

II. Analysis

On appeal, Defendant argues that (1) the trial court committed plain error by admitting the surveillance video into evidence; and (2) the trial court erred in its jury instructions regarding the safecracking charge. We address each argument in turn.

A. Videotape Evidence

[1] In his first argument, Defendant contends that the store manager's testimony was insufficient to authenticate the surveillance video because the testimony failed to establish the reliability of the surveillance system. Because defense counsel did not object to the admission of the video at trial, we review this issue for plain error. *See State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 806-07 (1983).

We hold that the surveillance video was properly authenticated based on decisions from our Supreme Court, including its recent decision in *State v. Snead*, ___ N.C. ___, 783 S.E.2d 733 (2016).

In *Snead*, our Supreme Court held that the recordings from a store's automatic surveillance camera "can be authenticated as the accurate product of an automated process" under North Carolina Rule of Evidence 901(b)(9). *Snead*, ___ N.C. at ___, 783 S.E.2d at 736 (internal quotation marks omitted). The Supreme Court determined that a detailed chain of custody for the video need not be shown unless the video is "not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* at ___, 783 S.E.2d at 737 (internal quotation marks omitted). Rather, the proponent must simply introduce "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process." *Id.* at ___, 783 S.E.2d at 736. It is generally sufficient for the party offering the video to "satisfy the trial court that the item is what it purports to be and has not been altered." *Id.* at ___, 783 S.E.2d at 737.

The *Snead* Court concluded that the testimony of a retailer's loss prevention manager was sufficient to authenticate the store's surveillance video, although the manager was not otherwise present at the time of the theft, where the manager testified that (1) the recording equipment was "industry standard," (2) it was in proper working order on the

date in question, (3) the system contained safeguards to prevent tampering, such as a time stamp and (4) the video introduced at trial was the same video he had watched on the digital video recorder. *Id.*

In the present case, the store manager testified that: (1) the surveillance system was comprised of sixteen night vision cameras, (2) he knew the cameras were working properly on the date in question because the time and date stamps were accurate, and (3) a security company manages the system and routinely checks the network to make sure the cameras remain online. The store manager also testified that the video being offered into evidence at trial was the same video he viewed immediately following the incident and that it had not been edited or altered in any way. Guided by our *Snead* and other decisions from our Supreme Court cited therein, we hold that the store manager's testimony is sufficient to lay a foundation for the admission of the surveillance video into evidence under Rule 901.

Even assuming, *arguendo*, that the store manager's testimony was not sufficient to lay a proper foundation, we hold that any error of the video's admission into evidence did not rise to the level of plain error in this particular case. Specifically, Defendant has not made any showing that the State would not have been able to lay a proper foundation had Defendant lodged an objection or that the video was somehow flawed. *See State v. Cummings*, 352 N.C. 600, 620-21, 536 S.E.2d 36, 51-52 (2000); *State v. Jones*, 176 N.C. App. 678, 682-84, 627 S.E.2d 265, 268-69 (2006). Accordingly, this argument is overruled.

B. Jury Instruction on Safecracking Charge

[2] In his second argument, Defendant contends that the trial court erred by giving jury instructions on the safecracking charge which varied materially from the allegations contained in the indictment. *See State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (stating that "the failure of the allegations [in the indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support the resulting conviction"). Specifically, Defendant points out that the indictment charged him with committing the offense "by means of [] a *fraudulently acquired* combination to the safe," whereas the trial court instructed the jury that it could convict if it determined that Defendant obtained the safe combination "by *surreptitious means*."

Our review of this issue on appeal is for *plain* error, as Defendant failed to object to the jury instruction at trial on the basis that it varied

materially from the indictment.[1] *See State v. Francis*, 341 N.C. 156, 159-62, 459 S.E.2d 269, 270-73 (1995); *State v. Odom*, 307 N.C. 655, 660-62, 300 S.E.2d 375, 378-79 (1983). To demonstrate plain error, Defendant must not only show error, but also prejudice—that, but for the error, the jury likely would have reached a different result. *State v. Tucker*, 317 N.C. 532, 539, 346 S.E.2d 417, 421 (1986).

One essential element of the crime of safecracking is *the means* by which the defendant attempts to open a safe. In the present case, *no* evidence was presented by the State from which the jury could have concluded that Defendant attempted to open the safe by *the means* as alleged in the indictment (by means of a "fraudulently acquired combination to the safe"). The State, however, did offer evidence from which the jury could conclude that Defendant attempted to crack the safe by the means contained in the jury instruction (by using a combination obtained "by surreptitious means"). Accordingly, as more fully explained below, we reverse Defendant's safecracking conviction. *See Williams*, 318 N.C. at 631, 350 S.E.2d at 357 (holding that a variance between the indictment and the jury instruction is *fatal* where the variance concerns an offense element).

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. *State v. Barnett*, ___ N.C. ___, ___, 782 S.E.2d 885, 888 (2016) (internal quotation marks omitted). If the indictment's allegations do not conform to the "equivalent material aspects of the jury charge," this discrepancy is considered a fatal variance. *Williams*, 318 N.C. at 631, 350 S.E.2d at 357.

In the present case, Defendant was convicted of safecracking under N.C. Gen. Stat. § 14-89.1 for attempting[2] to open the restaurant safe. The elements of this crime are set forth in the statute as follows:

> (a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:
>
> (1) By the use of explosives, drills, or tools; or

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1. In his brief, Defendant acknowledges his failure to lodge a proper objection at trial to the instruction but argues on appeal for plain error review.

2. Our Supreme Court has held that N.C. Gen. Stat. § 14-89.1 makes "the completed act of safecracking and the attempted safecracking offenses of equal dignity." *State v. Sanders*, 280 N.C. 81, 88, 185 S.E.2d 158, 163 (1971).

> (2) Through the use of a stolen combination, key, electronic device, or other *fraudulently acquired implement or means*; or
>
> (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other *surreptitious means*; or
>
> (4) By the use of any other safecracking implement or means.

N.C. Gen. Stat. § 14-89.1(a)(1)-(4) (2013) (emphasis added). The *means* element which must be alleged and proven by the State is outlined in subsections (1)-(4) of the statute.

In the present case, the safecracking indictment alleged that Defendant attempted to open the restaurant safe "by means of [] a *fraudulently acquired combination to the safe*." This allegation is sufficient on its face to support a conviction under subsection (2) of N.C. Gen. Stat. § 14-89.1, which proscribes safecracking "[t]hrough the use of [some] fraudulently acquired implement or means." *Id.* § 14-89.1(a)(2).

The record shows, however, that the trial court instructed the jury that it could convict Defendant if it determined that he attempted to open the restaurant safe using a combination obtained "by *surreptitious* means," as indicated in subsection (3) of N.C. Gen. Stat. § 14-89.1. *Id.* § 14-89.1(a)(3).

The term "surreptitious" is defined in Black's Law Dictionary as "*unauthorized* and clandestine; stealthily and *usu. fraudulently done*." Black's Law Dictionary 1458 (7th ed. 1999) (emphasis added). As indicated in this definition, the term "surreptitious" undoubtedly includes fraudulent acts; however, it also encompasses other conduct, such as an "unauthorized" act *not* involving fraud.

In the context of the present case, while the "surreptitious means" jury instruction *could include* a finding that Defendant fraudulently obtained the combination (as alleged in the indictment), the instruction also allows for a conviction based on a finding that Defendant obtained the combination in an unauthorized, non-fraudulent manner. Our Court has previously held that an error of this type is harmless where essentially the same evidence is required to prove both the State's theory as contained in the indictment and the theory as contained in the erroneous instruction. *State v. Clinding*, 92 N.C. App. 555, 562, 374 S.E.2d 891, 895

(1989). However, here, we conclude that the variance is not harmless. The State offered no evidence that Defendant "fraudulently obtained" the combination. Rather, the evidence indicates that Defendant's girlfriend, Ms. Jackson, was given the combination when she worked as a manager of the restaurant but that she used the combination in an unauthorized (surreptitious) manner when she provided the combination to Defendant.

We note that the trial court recognized that the State's evidence did not support the crime as alleged in the indictment. The court *initially* instructed the jury that it could convict Defendant if it found that he "fraudulently acquired" the combination, as alleged in the indictment. However, after consulting with counsel, the trial court modified the instruction, replacing the term "fraudulently" with "surreptitious," stating that the original instruction did not "fit[] the evidence as presented in this case."

In reaching our result, we are guided by decisions from our Supreme Court. For instance, in *Williams*, our Supreme Court reversed the conviction of a defendant for forcible rape under N.C. Gen. Stat. § 14-27.21. *Williams*, 318 N.C. at 632, 350 S.E.2d at 358. Under that statute, an individual is guilty of forcible rape if he commits a rape *and* does one of three additional acts set forth in the statute. N.C. Gen. Stat. § 14-27.21 (2013). In *Williams*, the defendant was charged with the first-degree rape of his 12-year-old daughter in an indictment that alleged the rape was "by force and against her will[,]" but that did not allege that his daughter was under the age of 13 years of age, an alternate theory for the offense. *Williams*, 318 N.C. at 625, 350 S.E.2d at 354. *See generally* N.C. Gen. Stat. § 14-27.2(a)(1), (2) (2013).[3] However, the trial court instructed the jury that it could find the defendant guilty of first-degree rape if the jurors found that the defendant engaged in the act, "at the time, [the victim] was a child under the age of thirteen years." *Williams*, 318 N.C. at 630, 350 S.E.2d at 357 (internal quotation marks omitted). Our Supreme Court additionally stated:

> The requirements of a valid indictment are that it be sufficiently certain in the statement of the accusation so as to identify the offense with which the accused is charged; to protect the accused from being twice put in jeopardy for the same offense; to enable the accused to prepare for trial

3. Section 14-27.2 was re-codified as N.C. Gen. Stat. § 14-27.21 by Session Laws 2015-181, s. 3(a) effective 1 December 2015, and applicable to offenses committed on or after that date.

> and to enable the court on conviction or plea of guilty to pronounce sentence according to the rights of the case. . . . An indictment that does not accurately and clearly allege all of the elements of the offense is inadequate to support a conviction. . . . Finally, the failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction. . . .
>
> Because the jury in this case was instructed and reached its verdict on the basis of the elements set out in N.C.G.S. § 14.27.2(a)(1), whereas defendant had been charged with rape on the basis of the elements set out in N.C.G.S. § 14–27.2(a)(2) [by means of force] . . . , the indictment under which [the] defendant was brought to trial cannot be considered to have been a valid basis on which to rest the judgment. Therefore, we hold that the instructions given to the jury pursuant to N.C.G.S. § 14–27.2(a)(1) were fundamentally in error.

Id. at 630-31, 350 S.E.2d at 357 (citations omitted). *See also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422 (finding plain error where the defendant was indicted for kidnapping *by removal*, but convicted after the jury was instructed on a theory of kidnapping *by restraint*); *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 862-63 (1984) (finding plain error where the defendant was indicted for first-degree kidnapping on theories of facilitation of a felony and the victim was not released in a safe place, but the jury was instructed on the theory that the victim was terrorized and sexually assaulted). The Court therefore vacated the judgment because the defendant was never charged in the rape indictment under the only theory which the jury was instructed to consider. *Williams*, 318 N.C. at 631, 350 S.E.2d at 357. *See also State v. Taylor*, 301 N.C. 164, 270 S.E.2d 409 (1980) (vacating a kidnapping conviction, stating that "[i]t is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment"); *State v. Thorpe*, 274 N.C. 457, 164 S.E.2d 171 (1968).

The critical similarity between *Williams* and the present case is that there was *no* evidence produced at trial that would support the pertinent element alleged in the indictment, while there was evidence presented which supported the element on which the jury was instructed. It is not surprising that each jury (in *Williams* and in the present case) returned a guilty verdict after being instructed on an element supported

by the evidence produced at trial, though not alleged in the indictment. Likewise, it is clear that if instructed only on the theory alleged in the indictment, each jury, faced with a complete lack of evidence in support of the relevant element,[4] would have returned a not-guilty verdict. This is precisely the prejudice required to show plain error: that, but for the erroneous instruction, the jury likely would have reached a different result. *See Tucker*, 317 N.C. at 539, 346 S.E.2d at 421.

III. Conclusion

For the foregoing reasons, we hereby vacate Defendant's conviction for felonious safecracking and remand this matter to the trial court for resentencing and further proceedings consistent with this opinion. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (holding that when offenses are consolidated for judgment, the proper procedure is "to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated"). We find no error in Defendant's remaining convictions.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges BRYANT and STEPHENS concur.

4. The complete lack of evidence that Defendant obtained the combination by *fraud* led the trial court to stop proceedings in the middle of the jury charge, send the jury out of the courtroom, and initiate a discussion with counsel about how to instruct the jury on the safecracking charge, noting, "The [S]tate has a problem."

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 October 2016)

BATES v. GOMEZJUARDO No. 16-242	Union (15CVD1688)	Affirmed
BUNCH v. BUNCH No. 16-263	Pitt (11CVD10)	Affirmed
CAMPBELL v. CITY OF STATESVILLE No. 16-101	Iredell (15CVS1179)	Affirmed
CHATTERJEE v. IVORY No. 16-12	Halifax (14CVS28)	Affirmed in part; Vacated in part
FAGUNDES v. AMMONS DEV. GRP. No. 16-260	Wake (15CVS1191)	Dismissed
HALL v. BOOTH No. 16-123	Forsyth (12CVS4088)	Affirmed
IN RE A.M-M. No. 16-282	Buncombe (08JT366) (08JT368)	Affirmed
IN RE D.K.H. No. 16-174	Cabarrus (12JT142) (12JT143)	Affirmed
IN RE D.S. No. 16-408	Wake (13JT127)	Affirmed
IN RE E.D.D-A. No. 16-280	Buncombe (08JT34) (13JT328)	Affirmed
IN RE I.D.R. No. 16-218	Robeson (15JT63)	Affirmed
IN RE J.F. No. 16-259	Forsyth (13JT178)	Affirmed
IN RE J.S.M.O. No. 16-233	Henderson (12JT131)	Affirmed
IN RE J.W. No. 16-195	Durham (13J173-175)	Affirmed
IN RE K.W. No. 15-1357	Buncombe (15SPC799)	Affirmed

IN RE M.D. No. 16-325	Wake (14JT142)	Affirmed
IN RE N.G.F. No. 16-297	Cumberland (12JT206) (12JT402)	Affirmed
IN RE R.K.C. No. 16-354	Buncombe (12JT266) (13JT332)	Affirmed
IN RE Z.R. No. 16-204	Vance (14JT8)	Reversed
LYTLE v. N.C. DEP'T OF PUB. SAFETY No. 16-241	N.C. Industrial Commission (TA-23292)	Affirmed
MACKEPRANG v. MACKEPRANG No. 16-333	Cumberland (00CVD6036)	Affirmed
PASSMORE v. NAT'L RETAIL SYS., INC. No. 16-141	N.C. Industrial Commission (14-721937)	Affirmed
RIGGSBEE v. DURHAM CITY TRANSIT CO. No. 15-1276	N.C. Industrial Commission (13-760414) (Y91483)	Affirmed
SINGER v. STARK No. 15-1168	Iredell (13CVS591)	Dismissed
STATE v. ANDREWS No. 16-253	Edgecombe (14CRS53112) (14CRS53113) (14CRS53116)	No Error
STATE v. BENNETT No. 16-165	Rowan (11CRS55236-40)	No Error
STATE v. BLODGETT No. 16-376	Catawba (13CRS3021)	No Error
STATE v. BRADLEY No. 16-177	Jackson (14CRS50527)	No Error
STATE v. CHEKANOW No. 15-1294	Alleghany (14CRS50306) (14CRS50307)	Reversed and Remanded.

STATE v. DICK No. 15-1400	Guilford (13CRS100144) (13CRS100146) (13CRS100147) (13CRS100148) (13CRS100149) (13CRS100150) (13CRS100151) (13CRS100152) (13CRS100154) (14CRS24350)	Vacated in part and Remanded for New Trial and Resentencing
STATE v. GILLIS No. 16-226	Cabarrus (09CRS3474)	Reversed and Remanded
STATE v. LANCLOS No. 16-122	Jones (14CRS50017)	No Error
STATE v. LAWS No. 16-134	Yancey (15CRS269) (15CRS50297-99)	No Error
STATE v. LEACH No. 16-317	Iredell (11CRS52176) (11CRS52183)	Affirmed
STATE v. MANRING No. 16-130	Forsyth (14CRS55861)	No Error
STATE v. MAYS No. 16-315	Guilford (12CRS23050) (12CRS66358)	No Error
STATE v. SOOTS No. 15-1262	Catawba (14CRS2824)	No Error
STATE v. WEBB No. 16-267	Buncombe (12CRS52274) (12CRS52276) (13CRS55149)	Affirmed
STATE v. WILLIAMS No. 16-235	Pitt (14CRS57135)	Affirmed
STATE v. WRIGHT No. 16-19	Stanly (14CRS50141-42)	No Error
STATE v. YOUNG No. 15-1003	Alamance (13CRS4777) (13CRS55778)	No Error

WALTER v. WALTER No. 16-210	Macon (15CVS438)	Reversed
WATSON v. JOHNSTON CTY. EMER. SERVS. No. 15-1304	N.C. Industrial Commission (13-703221)	Affirmed
WILSON v. CURTIS No. 16-194	Durham (13CVS2727)	Affirmed

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